Supreme Court, U.S.
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In The

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, AND COLIN DARLING,

Petitioners,

vs.

LOWE EXCAVATING CO.,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court defamation suit alleging that labor organization engaged in "false" area standards picketing is preempted by the exclusive jurisdiction of the National Labor Relations Board?

2. Whether the Illinois Appellate Court decided an important federal question in a way that conflicts with relevant decisions of this Court when it improperly substituted a negligence standard established by this Court in *Linn v. Plant Guard Workers* and in so doing upset the carefully-crafted balance between federal and state interests demanded by the national labor policy?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties to this proceeding in the Illinois Appellate Court, Second District, are:

Petitioners: International Union of Operating Engineers, Local 150, AFL-CIO

The Petitioner is an unincorporated voluntary association and labor organization pursuant to 29 U.S.C. Section 151 that represents heavy equipment operators and other employees in the construction, excavating and material production industries in collective bargaining.

Respondent: Lowe Excavating Co., Inc.

Respondent is an Illinois corporation doing business in Illinois as an excavation contractor.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

Petitioners, International Union of Operating Engineers, Local 150, AFL-CIO, and Colin Darling pray that a Writ of Certiorari be issued to review a judgment of the Illinois Appellate Court, Second Judicial District, entered in the above-entitled case on May 28, 2002.

OPINIONS BELOW

The following opinions and orders have been entered in this case:

Lowe Excavating Co., Inc. v. International Union of Operating Engineers, Local 150, Illinois Supreme Court No. 93555 (May 30, 2002) (denying Petitioner's petition for leave to appeal) (Appendix [hereinafter "App. ___"] at App. 58);

Lowe Excavating Co., Inc. v. International Union of Operating Engineers, Local 150, Illinois Appellate Court, Second District, No. 2-00-1363 (February 22, 2002) (denying Petitioner's motion for reconsideration) (App. 22);

Lowe Excavating Co., Inc. v. International Union of Operating Engineers, Local 150 and Robert Darling, 327 Ill.App.3d 711, 765 N.E.2d 21, 262 Ill.Dec. 195 (2002) (finding that Petitioner negligently defamed Respondent because Petitioner "should have entertained" serious doubts as to the truth of published statements) (App. 1, 17);

Lowe Excavating Co., Inc. v. International Union of Operating Engineers, Local No. 150, Memorandum Opinion of the Trial Court and Order, Case No. 88 CH 34, Circuit

Court of the Nineteenth Judicial Circuit, McHenry County, Illinois (October 19, 2000) (finding in part that Petitioner did not knowingly or with reckless disregard for the truth publish statements defamatory to Respondent) (App. 37);

Lowe Excavating Co., Inc. v. International Union of Operating Engineers, Local No. 150, 180 Ill.App.3d 39, 535 N.E.2d 1065 (2nd Dist. 1989) (reversing trial court's finding that Respondent's claim for trade libel was preempted by federal law, but adopting the "actual malice standard" set forth in *Linn v. United Plant Guard Workers of America Local 114*), *petition for leave to appeal denied* 126 Ill.2d 560 (1989), *cert. denied*, 493 U.S. 975 (1989) (App. 24).

JURISDICTION

The judgment to be reviewed was entered by the Illinois Appellate Court, Second District on January 11, 2002 (App. 1). A petition for rehearing was denied on February 22, 2002 (App. 22). The Illinois Supreme Court denied the Union's petition for leave to appeal on May 30, 2002 (App. 58).

The Appellate Court of Illinois, Second Judicial District, entered judgment on March 3, 1989. The Supreme Court of Illinois denied the Petition for Appeal as a Matter of Right, or for Leave to Appeal on June 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

The statute involved here is the National Labor Relations Act (NLRA), (as amended), §§ 7, 8, 61 Stat. 140, 29 U.S.C. §§ 157, 158.

STATEMENT OF THE CASE

Statement of Facts

Sometime in February 1988, the International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150") learned that Lowe Excavating Co., Inc. ("Lowe") was performing excavating work at a federally-funded nursing home project called Ballashire Hall, which job was subject to Davis-Bacon prevailing wage laws (App. 6). In late January or early February 1988, Local 150 agent Colin Robert Darling received information from two Lowe heavy equipment operator employees that Lowe was not paying its employees the prevailing wage, either in salary, or comparable fringe benefits (App. 4). On February 12, 1988, Local 150 sent Lowe a mail-gram demanding proof that it was paying employees the area standard wages, including benefits (App. 5). On February 15, 1988, Local 150 agent Darling erected a picket against Lowe at Ballashire Hall (App. 6). Local 150's picket sign stated "Notice to Public; Lowe Excavating does not Pay the Prevailing Wage and Economic Benefits for Operating Engineers which are Standard in this Area; Our Dispute Concerns Only Sub-standard Wages and Benefits Paid by this Company" (App. 2). Soon thereafter, FAMCO, the general contractor, removed Lowe from the project, and Local 150 ceased its picket (App. 8-9).

On August 15, 1988, Lowe contracted with the Congress of Independent Unions ("CIU") as the representative of its employees, and made the contract retroactive to April 15, 1988 (App. 10). The CIU is an employer-friendly "union" that delivers to employers four-page contracts with wage rates and working conditions left blank for the employer to fill in at its discretion. Lowe's contract with the CIU provided for employees to receive wage rate increases a full 10 months after Local 150 members received annual wage increases, thus perpetuating even longer the wage differential between Lowe and the current prevailing wage (App. 10).

In April 1988, Lowe agreed to let Local 150 audit its payroll books (App. 53). The audit revealed that Lowe's wages were less than those paid Operating Engineers under the Illinois Heavy, Highway and Underground Agreement, and that its fringe benefits were severely inferior (App. 54). In fact, Lowe's pension plan was a profit sharing plan with conditions attached not contemplated by the Davis-Bacon Act. To be eligible for the Lowe Plan, employees had to be over 21 years of age, make in excess of $40,000 per year, be employed by Lowe on December 31 of the profit sharing year and have completed one year of service as of December 31.

In addition, Lowe employed an improper number of personnel that it classified as apprentice workers, without sufficient employees classified as journeymen. Both Local 150 and the United States Department of Labor ("DOL") have set guidelines that state the ratio of apprentices to journeymen allowed on a single construction project. The DOL guidelines allow one apprentice for every eight journeymen. Local 150's Heavy, Highway and Underground Agreement allows for one apprentice for five to ten

journeymen, two apprentices for eleven to twenty journeymen, and three apprentices for twenty-one to thirty journeymen. At the time of Local 150's picket, Lowe employed five apprentices and fourteen journeymen at the Ballashire Hall project, a ratio of 1 apprentice to 2.8 journeymen. Furthermore, Lowe did not have a DOL certified apprenticeship training program at the time of picketing. There is necessarily a wage difference between those employees classified as apprentices and those classified as journeymen, and Lowe employed more than its allowable share of lesser paid apprentice workers, resulting in a lesser labor cost to Lowe than contractors employing the correct ratio of apprentice to journeymen employees and paying the proper prevailing wage. Eventually, in October 1988, Lowe's apprenticeship program application was certified by the DOL, however, the DOL found that Lowe had greater than the correct ratio of apprentices to journeymen.

Statement of Proceedings in the State Courts

On February 17, 1988, this action was filed in McHenry County, Illinois Circuit Court, alleging that Local 150 defamed Lowe Excavating Co., Inc. by the use of false statements on picket signs, claimed damages for tortious interference with contract and prospective economic advantage, and sought to enjoin the picketing. On February 18, 1988, Local 150 removed the case to the United States District Court for the Northern District of Illinois. On June 10, 1988, the District Court remanded the case to state court.

On July 22, 1988, Lowe filed its first amended complaint. On August 1, 1988, Local 150 moved to dismiss the

amended complaint for lack of subject-matter jurisdiction because the claim was preempted by federal labor law within the primary jurisdiction of the National Labor Relations Board ("NLRB"). On August 4, 1988, Lowe filed its second amended complaint, and Local 150 renewed its original motion to dismiss. On August 11, 1988, the court granted Local 150's motion dismissing the second amended complaint as preempted, but granted Lowe leave to file a third amended complaint.

On September 29, 1988, Lowe filed its third amended complaint, alleging trade libel, tortious interference with contractual relations, tortious interference with prospective economic advantage, and negligent interference with contract, and renewed its motion for preliminary injunction.

On October 11, 1988, the Circuit Court denied Local 150's motion to dismiss and denied Lowe's request for preliminary injunction on grounds that Lowe's claim for trade libel was preempted by federal labor law. On October 13, 1988, Lowe filed a notice of interlocutory appeal in the Illinois Appellate Court. On March 3, 1989, the Appellate Court reversed the Circuit Court, finding that the claim for trade libel was not preempted by federal law, and remanded the case for further proceedings. In its opinion, the Appellate Court expressly stated that the standard of "actual malice" set forth in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), and *Krasinski v. United Parcel Service*, 124 Ill.2d 483, 530 N.E.2d 468 (1988) was to control the Circuit Court's decision.

Extensive discovery was conducted over the next several years, during which time Lowe failed to itemize the damages it claimed despite repeated demands by Local

150 for an itemization. Cross-motions for summary judgment were filed, and on January 21, 1998, the court denied both motions. On April 3, 2000, the trial court commenced a bench trial, at which time Lowe for the first time claimed damages in excess of $100,000. The trial judge excluded evidence of such damages, ruling that the evidence would be prejudicial to Local 150 at that point in the case. Trial continued through April 7, 2000, at which time the trial judge entered directed findings in favor of Colin Darling on all counts and Local 150 as to claims relating to Lowe's projects at Women's Health Care and Crystal Enterprises. In its appeal to the Illinois Appellate Court, Lowe contested only rulings related to picketing by Local 150 at Ballashire Hall. The trial resumed on June 21 through June 23, 2000 when the trial was concluded.

On October 19, 2000, the Circuit Court entered its Memorandum Opinion and Order, granting judgment in favor of Local 150 as to all claims in Lowe's third amended complaint. The trial court specifically found that under *Linn v. Plant Guard Workers* and *Krasinksi v. United Parcel Service*, Lowe failed to meet its burden to establish by clear and convincing evidence that Local 150's picket sign stating that Lowe did not pay area standard wages was in fact false, or that Local 150 published the statement either knowingly or with reckless disregard as to the truth of the statement. The court found that the case centered on whether Local 150's statement was true at the time of the Ballashire Hall picket. The trial judge expressly found that Lowe did not pay the established prevailing wage at the time of Local 150's picket, and therefore, Local 150's picket sign was not defamatory. The trial court further found that Local 150 did not knowingly,

or in reckless disregard of the truth, picket Lowe using the area standard picket signs.

Lowe appealed the Circuit Court's decision to the Illinois Appellate Court. On January 11, 2002, the Appellate Court issued a decision that reversed the trial court's finding that Local 150 did not defame Lowe. In its decision, the Appellate Court improperly stated the "actual malice" rule of law, and imposed a negligence standard on Local 150 to find that Local 150 defamed Lowe by its picket sign. The matter was remanded to the trial court for a hearing on damages.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ILLINOIS APPELLATE COURT THAT THE COMPANY'S CLAIMS ARE NOT PREEMPTED BY THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD IS IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The United States Congress derives its power to preempt state law from the Supremacy Clause of Article VI of the Federal Constitituion. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985). In an effort to ensure a uniform national labor policy, federal law preempts the regulation of labor relations by the states. That is, "States may not regulate activities that the [National Labor Relations Act, 29 U.S.C. § 151, *et seq.*] protects, prohibits, or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 286 (1986). As the Supreme Court ruled in *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959):

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

Consequently, the "first inquiry" here is whether "the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." *Plumbers' Union v. Borden*, 373 U.S. 690, 693-694 (1963).

It is now well-settled that picketing which conforms to the NLRB's "area standards doctrine" is protected by Section 7 of the NLRA. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 206 n.42 (1978); *Hod Carriers Local 41 (Calumet Contractors Assn.)*, 133 NLRB 512 (1961). As NLRB explained in *Local 741, United Association (Kieth Riggs Plumbing and Heating)*, 137 NLRB 1125, 1125-1126 (1962):

> A labor union normally seeks to organize the unorganized and to negotiate collective-bargaining contracts with employers; but it also has a legitimate interest apart from organization or recognition that employers meet prevailing pay scales and employee benefits, for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Sec. 176a, *et seq.*) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective-bargaining contract.

It is equally well-settled that where a union engages in area standards picketing with a recognitional or secondary object, such picketing is prohibited by section 8(b). *See, e.g., Local 3, International Brotherhood of Electrical Workers (Hunts Point Electrical Service)*, 271 NLRB 1580 (1984). Whether protected by § 7 or prohibited by § 8, the Union's conduct is subject to NLRB cognizance and therefore preempted under *Garmon* and its progeny.

The Illinois Appellate Court acknowledged that the area standards picketing by the Union was activity at least "arguably" protected by Section 7 of the NLRB (App. 30-34). That court recognized the federal right of the Union under the NLRB's area standards doctrine to advise the public of an employer's substandard payment of wages and benefits. Nevertheless, the Court held that Lowe's claims fell "within the exception to preemption noted by the United States Supreme Court in *Garmon* and is also not preempted by Federal case law" (A12; slip op. at 13).

Whether area standards picketing can be regulated by state defamation law is an issue of first impression. The Illinois Appellate Court's sweeping holding constitutes a dramatic expansion of the *Garmon* exception to the federal preemption doctrine. The ruling allows state court consideration of matters not traditionally subject to state defamation law and permits intrusion into an area of labor relations long considered immune from state regulation. Local 150 respectfully submits that it is entitled to review of the Illinois Appellate Court's decision by this Court because it presents a question of fundamental importance to federal labor relations law and is in conflict with previous decisions of this Court.

II. THE DECISION OF THE ILLINOIS APPELLATE COURT TO EXPAND THE EXCEPTION TO THE PREEMPTION DOCTRINE IS AN IMPORTANT QUESTION OF FEDERAL LABOR POLICY WHICH SHOULD BE SETTLED BY THIS COURT.

In *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), the Supreme Court held that malicious libel was conduct akin to intimidation and violence found to be within the exception to preemption under *Garmon*. During the course of a representation election campaign in *Linn*, the Union circulated a leaflet that accused various company officials of "lying" to company employees, alleged that the company had "robbed" them of pay increases, and warned that, "Somebody may go to Jail!" *Id.* at 56. In defining the problem of whether the state court had jurisdiction to remedy false and defamatory statements made during a union organizing campaign, the Court first observed that (*id.* at 58):

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

Nevertheless, while the NLRB might tolerate "intemperate, abusive or inaccurate statements," it does not interpret the NLRA to permit the parties "to injure the other intentionally by circulating defamatory or insulting material

known to be false." *Id.* at 61. State court jurisdiction over such claims based on such conduct would not interfere with the NLRB's jurisdiction because (*id.* at 64):

> The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption. As stressed by THE CHIEF JUSTICE in his dissenting opinion in [*United Automobile Workers v.*] *Russell,* [356 U.S. 634, 649 (1958)]:
>
> > The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy. . . .

Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the NLRB's jurisdiction over the merits of the labor controversy.

The Court concluded that in light of these considerations "it appears that the exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor Management Relations Act.'" 383 U.S. at 61. It added, "We believe that 'an over-riding state interest' in protecting its residents from malicious libels should be recognized in these circumstances." *Id.*

Relying on *Linn* the Illinois Appellate Court found Lowe's claims here to fit within the exception established by *Garmon*. As the Appellate Court explained (App. 35):

> The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered. These issues are of only peripheral concern to the NLRB.

This conclusion is plainly contrary to federal labor policy and controlling case law and should be reversed.

A. The Illinois Appellate Court's Decision Requires The Trial Court To Decide The Merits Of The Labor Controversy And Thereby Infringes Upon The Exclusive Jurisdiction Of The NLRB.

The Illinois Appellate Court's statement of the issue and consequent decision understates the concern of the NLRB in administering the area standards doctrine, and is at odds with this Court's previous decisions. In *Linn*, the Court was careful to emphasize that underlying the preemption doctrine is the need to prevent state interference with the national labor policy. *Id.* at 59-60, *quoting, Plumbers' Union v. Borden*, 373 U.S. 690 (1963); *cf., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201, n.31 (1978) (state law trespass suit to enjoin picketing is not threat to primary jurisdiction of NLRB because state court had "no occasion to interpret or enforce" the provisions of the NLRA).

Here, whether Lowe is paying its employees wages and benefits equal to the area standard *is* the labor controversy. The NLRB has both the expertise and established case precedent to resolve that controversy. In a dispute over whether an employer pays the area standard, the NLRB will customarily examine the truth of a union's assertion that the picketed employer pays substandard wages and benefits. Charles J. Morris, ed., 2 *The Developing Labor Law*, 1081 (2d ed. BNA 1983). Furthermore, contrary to the reasoning of the Illinois Appellate Court, resolution of the area standards issue is an essential precondition to a determination of the validity of any defamation claim.

Lowe's claims are fundamentally different from those presented in *Linn* and the other cases relied upon by the Illinois Appellate Court because to determine the truth or falsity of the language on the Union's picket sign requires the State Court to interpret and apply the NLRB's area standards doctrine. The rationale underlying the area standards doctrine is that "a union may picket where the labor costs of the picketed employer are alleged by the Union to be below those the Union has established in the area." *Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets, Inc.)*, 205 NLRB 462, 468 (1973). Determining whether a company's labor costs are below the area standard is, therefore, usually much more than a simply arithmetical comparison of wages.

The NLRB's analysis of what goes into the labor cost calculation is a patchwork of decisional law. *See, e.g., Local 107 International Hod-Carriers (Texarkana Construction Co.)*, 138 NLRB 102, 103 (1962) (finding valid area standard pickets protesting employer's failure to pay Davis-Bacon wage standard); *Retail Clerks International Association*

Local 899 (State-Mart, Inc.), 166 NLRB 818, 821 (1967) (fringe benefits such as pensions and health and welfare plans are "like wages . . . measurable cost items" subject to area standards protest); *Automotive Employees Local 88 (West Coast Cycle Supply Co.)*, 208 NLRB 679, 680 n.8 (1974) (seeking information on such "non-cost matters" as seniority and layoff policies is irrelevant to question of comparative labor costs therefore inconsistent with area standards goal suggesting unlawful recognitional object); *cf., D.J. Gasaway, Inc. v. Carpenters Local 1889,* 123 LRRM 2669 (N.D. Ill. 1986) (company's apprentice-journeymen ratio is one factor in determining union's motive in picketing to enforce area standards). It is this body of NLRB case law that the state courts must necessarily "interpret or enforce" in determining whether the Union falsely accused the Company of failing to pay area standards. To do so, however, presents precisely the interference with the exclusive jurisdiction of the NLRB which the Supreme Court sought to prevent in *Garmon*. Far from being of "peripheral concern" to the NLRB, state court jurisdiction over wage and benefit issues like those presented here go to the heart of NLRB's mission.

The Illinois Appellate Court's conclusion that the issue of the Union's mental state was only of peripheral concern to the NLRB is likewise erroneous. The NLRB will hold area standards picketing to constitute an unfair labor practice in violation of the NLRA if it finds an organizational, recognitional, or other unlawful objective. *See, generally,* Morris, *supra,* at 1077-1083. Determination of the union's true objective – its "mental state" – is a question of fact to be decided by the NLRB. *Local 741, United Association (Keith Riggs Plumbing and Heating Contractor)*, 137 NLRB 1125, 1126 (1962). Indeed, if a union

falsely claims that the employer fails to pay area standards, the NLRB will infer an unlawful object and find an unfair labor practice. *Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets, Inc.),* 205 NLRB 462, 417-474 (1973). Hence, the Union's mental state (object) in picketing Lowe is central to the NLRB's determination of the legitimacy of that picketing under the area standards doctrine.

It is difficult to overstate the significance of the Illinois Appellate Court's decision in terms of its incursion into the NLRB's exclusive jurisdiction. For example, were a Union to picket an employer during contract negotiations and state on its picket signs that the employer had engaged in bad faith bargaining, the state court would need to apply the entire body of NLRA § 8(a)(5) decisional law to determine the truth or falsity of the picket sign language. Indeed, any form of "unfair labor practice picketing" – picketing to protest alleged violations of federal labor law – would become actionable in state court under the Illinois Appellate Court's rule in *Lowe*. Similarly, if the Union picketed an employer for an alleged failure to honor the provisions of an existing collective bargaining agreement, under the Illinois Appellate Court's rule in *Lowe* the state courts would be required to interpret the agreement to determine whether such an allegation was false – an exercise of judicial authority forbidden the state courts under § 301 preemption. *See, Allis-Chalmers v. Lueck,* 471 U.S. 202 (1985).

The Illinois Appellate Court itself fell into that trap. In its discussion of the facts, the court stated that on August 15, 1988, the Company signed a contract with another union retroactive to April 15, 1988, which "provided that Lowe would pay wages equal to or higher than

others in the area." That conclusion required the Illinois Appellate Court to interpret a collective bargaining agreement and compare the wages and benefits specified to those of Local 150's collective bargaining agreement. To the extent that interpretation serves as a basis for resolving the dispute here (that is, the factual issue of truth or falsity underlying the state law tort claim) it is "inextricably intertwined with consideration of the terms of the labor contract" and therefore preempted by Section 301 of the NLRA. *Allis-Chalmers,* 472 U.S. at 213; *cf., Krasinski v. United Parcel Service,* 124 Ill.2d 500, 530 N.E.2d 468, 471 (1988) (resolution of defamation claim based upon accusation of criminal conduct not dependent upon analysis of contract).

The Illinois Appellate Court recognized the danger to a uniform national labor policy presented by "several separate and distinct tribunals with a diversity of procedures [which] are as sure to produce inconsistent decisions as are different substantive rules of law" (App. 32). Nevertheless it found the state's interest in protecting its citizens from malicious libels outweighed the federal interest. The Union respectfully submits that this is so only when the resolution of the libel claim turns solely upon interpretation and consideration of state law. Once resolution of that libel claim by the state court requires application of federal law, the federal interest becomes paramount, and the state court's jurisdiction is preempted.

B. The Alleged Libel To The Company Here Is Not The Sort That Is So Deeply Rooted In Local Feeling As To Preclude Preemption.

In applying the *Linn* exception to the present case, the Illinois Appellate Court also suggested that state court

jurisdiction was warranted because matters such as malicious libel are "so deeply rooted in local feeling" (App. 32). The Union argued before the appellate court that the state's interest in protecting its citizens from malicious libels traditionally actionable under the common law is different from its interest here where the allegation is that the Company failed to pay area standards. In rejecting this argument, the Illinois Appellate Court said it found "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis" (App. 33). Local 150 respectfully submits that this too was error.

In *Garmon*, this Court expressly based its analysis on the "type of conduct" involved. 359 U.S. at 248. Where the type of conduct constituted "intimidation and threats of violence," it "affected such compelling State interests as to permit the exercise of State jurisdiction." *Linn*, 383 U.S. at 62. Thus, a threat of violent picketing is actionable in state court; a threat to picket peacefully in violation of Section 8 of the NLRA is not. *See, Garmon,* 539 U.S. at 245-246. *Linn* itself thus requires analysis of the "specific content" of the alleged untruth.

A close examination of the case law which has addressed the interplay between state defamation law and federal labor policy reveals the unprecedented nature of the Illinois Appellate Court's extension of the *Linn* exception. In *Krasinski,* like *Linn*, the defamation plaintiff had been accused of criminal conduct. 124 Ill.2d 483 (1988). So, too, the plaintiffs in all the other cases relied upon by the Illinois Appellate Court alleged harms as the result of traditional, garden-variety defamatory statements: *Fisher v. Illinois Office Supply Co.,* 130 Ill.App.3d 996, 474 N.E.2d 1263, 1264 (3rd Dist. 1984) (plaintiff discharged for

allegedly falsely representing the replacement of photo chemicals previously borrowed); *Mays v. Reynolds Metals Co.*, 516 So.2d 517, 518 (Ala.1987) (plaintiff discharged for alleged arson); *Henderson v. Teamsters Chauffeurs Warehousemen and Helpers Local 313,* 90 Wash.2d 666, 585 P.2d 147 (1978) (rival union politicians allegedly defamed plaintiff by telling his employers he was a "troublemaker"); *Tosti v. Ayik,* 394 Mass. 482, 476 N.E.2d 928, 931 (1985) (plaintiff company foreman accused by union activist of falsifying repair records).

The interests of the above individual citizens are qualitatively different from the interests asserted by Lowe here. The state courts have traditionally protected individuals against false claims of criminal conduct and other accusations of dishonesty. In no case, however, has the state court found defamatory allegedly false statements on picket signs that a company was failing to pay area standards. Local feelings of outrage over false claims of theft and lying are simply absent from disputes as esoteric as the one between Lowe and Local 150 here. Neither the method of publication (picketing) nor the content of the message (failure to pay area standards) here are subject to proper regulation through state defamation law. The Illinois Appellate Court erred in so finding and its decision must be reversed.

III. THE ILLINOIS APPELLATE COURT IMPROPERLY STATED AND APPLIED THE RULE OF ACTUAL MALICE AND IMPOSED A NEGLIGENCE STANDARD ON LOCAL 150

Thirty-eight years ago, this Court established the rule of law that in libel claims for statements about public servants, the plaintiff must establish that the statement

was made with "actual malice." *New York Times v. Sullivan*, 376 U.S. 254 (1964). Two years later, in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), this Court extended the "actual malice" standard to claims that arise out of a labor dispute. As this Court explained (383 U.S. at 64-65):

> In view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with the effective administration of national labor policy, the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The Court added that it was adopting the *New York Times v. Sullivan* "actual malice" standard "by analogy, rather than under constitutional compulsion" in an effort to to promote the national labor policy designed to protect robust labor speech. *Id.* at 65.

Linn requires that a plaintiff in libel suit arising out of a labor dispute prove that (a) the published statement was false; (b) the false statement was made with knowledge of falsity or reckless disregard for its truth; (c) actual harm resulted from the statement. Under *Linn* and its progeny, Lowe's burden in stating a claim of defamation is heavy. "Actual malice" – also known as constitutional malice – is not proven by evidence of hatred or ill will. *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Instead, "[t]he *sine qua non* for recovery in a labor dispute under

Linn [v. Plant Guard Workers], 383 U.S. 53 (1966) is the existence of falsehood." *Id.* at 283. A plaintiff is required to prove that false statements were made about it with knowledge of their falsity or reckless disregard for the truth. *Pease v. Operating Engineers, Local 150*, 576 N.E.2d 614, 620 (Ill.App. 2nd Dist. 1991). "Reckless disregard for the truth may be found only where the evidence shows that defendant, in fact, entertained serious doubts as to the truth of the publication. *Id.*, *citing, Costello v. Capital Cities Communications, Inc.*, 125 Ill.2d 402, 532 N.E.2d 790 (1988).

In its opinion on Lowe's appeal of the Circuit Court's decision, the Illinois Appellate Court improperly stated that Local 150 "*should have at least entertained serious doubts as to the truth of the statements contained on the picket signs.*" *Lowe Exvavating, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 327 Ill.App.3d 711, 765 N.E.2d 21, 262 Ill.Dec. 195 (Ill.App. 2002) (emphasis added).

Actual malice is the polar opposite of a negligence standard. Nevertheless, the Appellate Court significantly lowered the standard of actionable conduct by finding that, "Darling at least *should have* entertained serious doubts as to the truth of the statements contained on the picket signs" (Opinion at 17) (emphasis added). Asking what a defendant "knew, or in the exercise of reasonable care, should have known" is a negligence standard. *Harris v. Walker*, 119 Ill.2d 542, 550, 519 N.E.2d 917 (1988); *see also* K.S. Abraham, "The Trouble with Negligence" 54 *Vanderbilt Law Review*, 1187, 1220 (2001) ("if the negligence standard applies the question is what the defendant should have known"). But "the 'reasonably should have known' standard, which is essentially a negligence standard, is

inconsistent with the 'reckless disregard' standard." *Brown v. M&M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989). Hence, as the Illinois Appellate Court explained in *Martin v. State Journal-Register*, 244 Ill.App.3d 955, 963-964, 612 N.E.2d 1357 (4th Dist. 1993) (emphasis in original):

> *New York Times* malice does not incorporate mere suspicion or what a reporter *should have* known. Instead it requires that the reporter *actually knew* that the information was false or acted with such disregard for the truth as to rise to the level of *recklessness*. The record indicates that Gibson either believed her sources or – *at the worst*, merely suspected that they might not have provided her with the whole truth. This state of mind does not come close to *New York Times* malice.

Other courts to have considered this problem have reached conclusions similar to those of the Illinois Appellate Court in *Martin*. *See, e.g., Betty v. Ellings*, 773 N.W.2d 12, 18 (Minn. S.Ct. 1969); *Hoffman v. Capital Cities/ABC, Incorporated*, 255 F.3d 1180 (9th Cir. 2001); *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 313 (5th Cir. 1995); *Robinson v. Cutchin*, 140 F.Supp.2d 488, 495 (2001). As the Court of Appeals of Ohio stated in *Doe v. Lodi Community Hospital*, 2000 WL 1825095 (Ohio App. 9th Dist. 2000):

> Examples of "reckless disregard" are situations in which the defendant fabricated the story, relies on his or her imagination, or based the statements on unverified anonymous sources. . . . Because mere negligence is not enough to establish actual malice, the test for determining whether the defendant entertained "serious doubt" is not an objective one – i.e., whether a reasonable person should have questioned the truth of his or her

> statements. Rather, the test is a subjective one, requiring the plaintiff to produce clear and convincing evidence that the defendant "in fact" entertained serious doubts about the truth of his statements or the sincerity or accuracy of his sources.

There is no evidence in the trial record, let alone clear and convincing evidence, that Colin Darling of Local 150 in fact entertained serious doubts over the truth of Local 150's picket sign. The trial record revealed that prior to the picketing, Darling did speak to Lowe employees about their wages and benefits and found out they were below area standards. Local 150 sent a telegram to Lowe three days prior to picketing seeking documents proving Lowe paid area standard benefits and wages. Local 150 received no hard evidence in response. The only evidence Local 150 received from Lowe were unsupported statements of compliance, shown at trial to be inaccurate.

The Appellate Court's holding that Darling *should have* entertained doubt and was therefore negligent in not doing so constitutes an improper legal standard in conflict with this Court's decision in *Linn v. Plant Guard Workers*. The Appellate Court erroneously reversed the Circuit Court's decision finding that Lowe failed to prove by clear and convincing evidence that Local 150 published its statements with actual malice, or with reckless disregard for the truth, and has upset the carefully-crafted balance between federal and state interests and has intruded into the enforcement of the national labor policy.

CONCLUSION

For all the above stated reasons, Petitioner International Union of Operating Engineers, Local 150, AFL-CIO, respectfully requests the Court to issue a *writ of certiorari* to the Illinois Appellate Court.

Respectfully submitted,

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765 N.E.2d 21

Appellate Court of Illinois,
Second District.

LOWE EXCAVATING COMPANY,
Plaintiff-Appellant and Cross-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 150 and Robert Darling,
Defendants-Appellees and Cross-Appellants.

No. 2-00-1363.

Jan. 11, 2002.

As Modified Upon Denial of Rehearing Feb. 22, 2002.

Gerard C. Smetana, Smetana & Avakian, Chicago, Michael E. Avakian, North Springfield, VA, for Lowe Excavating Co.

Louis E. Sigman, Dale D. Pierson, Elizabeth A. LaRose, Baum, Sigman, Auerbach, Pierson, Neuman & Katsaros, R. Mark Gummerson, Campion, Curran, Rausch, Gummerson & Dunlop, P.C., Crystal Lake, for Robert Darling, International Union of Operating Engineers Local No. 150.

Modified Upon Denial of Rehearing

Justice McLAREN delivered the opinion of the court.

The following facts are taken from the record. Plaintiff, Lowe Excavating Company, is an Illinois corporation engaged in excavating and site preparation services since 1969. Marshall Lowe was the president of Lowe at the time of the incidents at issue. Defendant International Union of Operating Engineers Local No. 150 (the Union) is

a labor organization doing business in McHenry County. Defendant Colin "Robert" Darling was a business agent employed by the Union at the time of the incidents at issue.

On February 15, 1988, the Union began picketing at a Lowe project site, known as Ballashire Hall, with signs stating:

"NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY **LOCAL 150** International Union of Operating Engineers, AFL-CIO"

On February 17, 1988, Lowe filed a complaint seeking a temporary restraining order (TRO), preliminary and permanent injunctions, and damages. The following day, the Union filed a petition for removal to the United States District Court, arguing that Lowe's claim seeking an injunctive relief was preempted by federal law. On June 10, 1988, the United States District Court for the Northern District of Illinois denied the Union's petition and remanded the case to the state trial court, stating that "Lowe's complaint does not on its face contain a federal claim."

On June 30, 1988, the trial court enjoined the Union from picketing Lowe in McHenry County until the court ruled on Lowe's request for a preliminary injunction. On August 11, 1988, the trial court dismissed Lowe's second amended complaint based on the Union's claim that the court lacked subject matter jurisdiction due to federal

preemption. The court granted Lowe leave to file a third amended complaint.

On September 28, 1988, the Union resumed picketing. The following day, Lowe filed a third amended complaint seeking a temporary restraining order, preliminary and permanent injunctions, and damages. Lowe also filed a motion for a temporary restraining order, preliminary injunctions, and the reconsideration of the dismissal of the second amended complaint based on the lack of subject matter jurisdiction. The court again enjoined the Union from picketing Lowe until the court's ruling on Lowe's request for a preliminary injunction. On October 6, 1988, the Union filed a motion to dismiss this third amended complaint, again asserting that, based on federal preemption, the trial court lacked subject matter jurisdiction.

On October 11, 1988, the court partially granted Lowe's motion for a temporary restraining order enjoining the Union from "picketing or otherwise disseminating the fact that Lowe is non-union." The court also denied the Union's motion to dismiss Lowe's third amended complaint and denied Lowe's "request for preliminary injunctive relief relating to area standards, in reckless disregard for the truth," based on federal preemption grounds. Lowe filed an interlocutory appeal of this decision.

On March 3, 1989, this court reversed the trial court's decision and remanded the case for a hearing. *Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150,* 180 Ill.App.3d 39, 129 Ill.Dec. 300, 535 N.E.2d 1065 (1989).

The trial on Lowe's third amended complaint began in April 2000. The four claims proceeding to trial against the Union and Colin Darling, as an individual, were count II,

alleging tortious interference with contractual relationship; count IV, alleging tortious interference with prospective economic advantage; count V, alleging trade libel; and count VI, alleging negligent interference with contract.

At the trial, Darling testified that late in the summer or early in the fall of 1987 he spoke with two Lowe employees, Hartzell Zimmerman and Pasqual Gebbia. Zimmerman and Gebbia told Darling what they were making at the time and what benefits they received. Darling stated that the men showed him their pay stubs and that these were the only pay stubs Darling saw. However, during a deposition in 1994, Darling stated that he had not seen pay stubs. Darling explained at trial that his memory was better at trial in April 2000 than it was when he gave his deposition.

Darling also testified that in February 1988 the class one (top wage) under the Union's master collective bargaining agreement was $19.40 an hour to be increased to $20.10 an hour on June 1, 1988, and the class two wage was $18.85 an hour. These were the wages that were appropriate for the Ballashire Hall project. The contribution to various fringe benefit funds was $2.20 an hour. Also, the master agreement provided that no more than 1 apprentice was permitted on a job with less than 7 journeymen, 2 apprentices for between 7 and 13 journeymen, and 3 apprentices for between 13 and 22 journeymen.

In October 1987 the Union initiated efforts to unionize Lowe's employees. Marshall Lowe arranged for representatives of the Union to met [sic] with Lowe employees. At the meetings, the Union and Lowe presented the employees with comparisons of their respective wages and benefits.

Darling testified that, during a meeting with Marshall Lowe in December 1987 or January 1988, Marshall provided several documents, including Lowe's 401(k) pension plan, profit-sharing plan, and payroll information. Darling gave these documents to the Union's fund administrator, Larry Bushmaker. Darling talked to Union president Bill Dugan about Zimmerman's and Gebbia's claims that they were not getting area standard wages. Darling never asked anyone to investigate Lowe's wages and benefits paid after the summer of 1987. Early in 1988 Dugan and his assistant, Bill Anderson, and Darling decided that the Union should picket Lowe. Darling stated that, after the initial pickets began, Marshall told Darling that Lowe had a federally funded project but would not tell Darling where the project was.

Marshall Lowe testified that on February 12, 1988, he sent the Union's fund administrator, Bushmaker, a letter notifying Bushmaker that another employee meeting was scheduled for March 12, 1988, so that Bushmaker could explain the Union's fringe benefits to Lowe's employees. However, Bushmaker never responded to this letter, and the meeting did not take place.

On February 12, 1988, Lowe was read a mailgram from the Union over the phone, which stated in part:

> "Local 150, International Union of Operating Engineers is informed that your company is currently performing construction work at Canterbury Place Retirement Community. Local 150 has attempted to make careful investigation of your company's policies regarding the payment of area standards to individuals performing construction work at this project. We have determined that the area standards for the operating

> engineers are not being met at this project. If our information regarding this fact is incorrect, please advise us immediately."

Darling testified that after the Union sends notice that it intends to picket it waits 48 hours so that the contractor can prove that it pays prevailing wages. However, Darling stated that this requires "solid evidence" like "an audit" before it will decide not to picket.

In response to the Union's mailgram, Marshall Lowe sent the Union a mailgram on February 15, 1988, stating that "we are paying the area standards and in fact are paying higher wages and fringes to our men." Marshall Lowe was shocked by the Union's mailgram because Marshall had been congenial to the Union, providing it access to his employees and their telephone numbers. Further, Marshall had told Darling what he was paying his employees.

Nevertheless, at 6 a.m. on February 15, 1988, the Union began picketing at Lowe's project at Ballashire Hall. The Ballashire Hall project involved the construction of a nursing home as part of a larger retirement community project called Canterbury. FAMCO was the general contractor for both projects.

Ballashire Hall was a federally funded construction project of the federal Department of Housing and Urban Development (HUD). Employers on HUD projects are required by federal law to pay their employees the prevailing area wage and benefits established by the United States Secretary of Labor. 40 U.S.C.A. § 276a (West 1982) (the Davis-Bacon Act).

Darling testified that he knew that the failure to pay prevailing wages on a federal project was a crime. Darling also knew that Lowe was working on other projects at the time, but he chose to picket the Ballashire Hall site because it was a large one, he was familiar with it, and he knew that Lowe was working on a foundation there. Darling used the Union's preprinted area standards picketing signs and simply added the name "Lowe Excavating." Darling received Lowe's mailgram response on February 15, 1988, at his home but did not respond because he was "not supposed to talk to anybody" because it was not part of his job to do so. Darling stated that the only information he had about Lowe's wages came from Zimmerman and Gebbia.

Bradley Brei, president of FAMCO, the general contractor of the Ballashire Hall project, testified that he approached Darling on February 15, 1988, while Darling was picketing at the site. Brei told Darling that Brei had "already filed certified payrolls with HUD that Lowe was paying prevailing wage rates and [he] could not understand on what the basis was that he was there or why the pickets were there [*sic*]." Brei asked Darling, "[H]ow can you picket on a basis that he's not paying prevailing wage rates when they've been certified?" Brei stated that if he turned in false payroll records he would be subject to a federal penalty.

Darling testified that he responded to questions by Brei and Al Woods, another FAMCO representative, by telling them to read the picket sign. Darling also told Brei that the only way the picket signs would be removed was if Lowe was removed from the Ballashire Hall job.

Brei testified that, after speaking with Darling on the picket line, Brei went to his construction trailer and called Marshall Lowe and asked Marshall to remove his people from the site. Lowe's employees left the Ballashire Hall project site an hour or two later. However, the pickets did not come down. Darling told Brei that Lowe's equipment also had to be removed. Brei stated that even after the equipment was removed the picketing continued "[f]or a period of time."

Marshall Lowe testified that both Lowe's employees and equipment were off the Ballashire Hall project site by 11 a.m. on February 15, 1988. Marshall testified that he knew that Lowe was required to pay prevailing wages at the Ballashire Hall project under the penalty of perjury. Further, Lowe sent certified payrolls for January 1988 to HUD. Marshall stated that Ballashire Hall was the first project for which Lowe paid prevailing wages. Prevailing wages for that project were an hourly rate of $18.60 for class one equipment and $5.55 for benefits. Marshall stated that there was a tremendous amount of work left to be done at the Ballashire Hall project when Lowe was removed, including the sewer work, digging and excavating the foundation, putting fill on the inside of the slab, grading around the building, the parking lot, and gravel and finish grading. Marshall testified that Lowe's removal from the Ballashire Hall project resulted in $4,680 in lost profits (Lowe's profit margin was 18%).

Lowe employee Michael Dobler testified that he worked at the Ballashire Hall project site during the picketing. Dobler stated that all of Lowe's equipment had been removed from the site on the first day of picketing, February 15, 1988. Dobler stated that the picketing continued on February 16 and 17, 1988. On his way to

work at 6:30 a.m. on February 17, 1988, Dobler saw picketers at the site carrying the same signs they carried on the prior two days. Dobler did not see the picketers later that day at 3:30 p.m. when he drove past the site.

Darling contradicted Marshall's testimony, saying that Lowe's equipment was not removed until the following day, February 16, 1988. Darling also contradicted Dobler, stating that the picketing stopped on February 16, 1988. Darling stated that he returned to the site on February 17, 1988, but he denied that the pickets were up on that day. Darling stated that after the February picketing Darling met Marshall at a restaurant and Marshall told Darling that Lowe had a federally funded project but Marshall would not reveal where it was.

Frank Stampler, a certified public accountant (CPA), testified that in April 1988 he and two other CPAs audited Lowe's wages and benefits for the period of January 13, 1988, to February 16, 1988. Stampler compared Lowe's wages and benefits to those required by the United States Department of Labor. Stampler stated that for the period of January 13, 1988, to February 16, 1988, Lowe's employees at the Ballashire Hall project were paid over the federal prevailing wage rate, including any apprentices on the site. Stampler stated that the prevailing rate is composed of the hourly individual wage and benefits added together. The allocation to the profit-sharing plan of each Lowe's employee was made at the end of each year and was based on certain factors. However, Stampler concluded that Lowe's operators were paid "in excess of the prevailing rate" at the Ballashire Hall project in 1988.

John P. O'Hagan, president of Human Resources Planning Associates, testified that, early in the spring or

summer of 1987, and again early in 1988, at Marshall's request, he compared Lowe's benefits to the Union's. O'Hagan concluded that Lowe's health insurance plan provided more comprehensive and broader coverage than the Union's. Regarding disability benefits, O'Hagan opined that the two plans were different, but O'Hagan did not say that one plan was better than the other. Lowe's life insurance benefits were superior to the Union's.

In March 1988, the Congress of Independent Unions (CIU) was certified as the representative of Lowe's employees. On August 15, 1988, the CIU and Lowe entered into a collective bargaining agreement that provided that Lowe would pay prevailing wages, retroactive to April 15, 1988. R. Richard Davis, vice-president of the CIU, testified that, at all relevant times, the CIU contract base rate was higher than the prevailing wage. However, Davis acknowledged that the Union employees received a wage increase every June, while under the CIU contract, Lowe employees did not receive their wage increase until April of the following year, 10 months later than the Union employees. Thus, from June 1988 to April 1989, Lowe employees would earn $.70 less than the Union employees.

Darling and the Union began picketing again at the Ballashire Hall project site in September 1988, where Lowe was once again working. Darling knew that Lowe was working on the federal part of the Canterbury project at that time. The picketers used the same signs that were used in February. By the summer of 1988, Darling knew the Ballashire Hall project was federally funded. Before the September picketing, Marshall Lowe told Darling that Lowe was paying prevailing wages. On September 28, 1988, Darling received a mailgram from Lowe stating that Lowe was withdrawing from the Ballashire Hall project.

The same day, Darling received a second mailgram from Lowe stating that it was paying area standards and that it was setting up a second gate to allow union contractors to enter the site without crossing the picket line.

Marshall testified that, after Lowe was removed from the FAMCO job in September 1988, Lowe did not work with FAMCO again for five or six years. The trial court did not permit Lowe to admit evidence that it lost $125,000 of work at an 18% profit ($18,750 lost profit) caused by its removal from the Ballashire Hall project in September 1988.

Brei testified that he was frustrated with Marshall "that he didn't get his house in order." Brei again removed Lowe from the project and replaced Lowe with another contractor to put in the parking lot and perform the grading. However, the Canterbury project was never completed because the developers did not obtain full occupancy.

At the close of Lowe's case, the trial court granted a directed finding in favor of Colin "Robert" Darling, as an individual, as to all counts of Lowe's third amended complaint. The court also granted a directed finding in favor of the Union as to the claim for negligent interference with contractual relationship and on all counts as to the damage issue.

The trial court granted Lowe's motion to conform its pleadings to the evidence presented at trial.

The trial court refused to allow Lowe to present evidence of its attorney fees as a measure of punitive damages, but it allowed Lowe to submit an affidavit as an

offer of proof that it had incurred more than $100,000 in fees.

After hearing the evidence and arguments, the trial court found in favor of the Union on all counts. The court found that count V, the trade libel count, was not proved by Lowe because Lowe failed to prove by clear and convincing evidence that the Union's statements were false, that the Union made these statements knowing them to be false or with reckless disregard of whether the statements were true or false, or that the Union was given information before it began to picket that the Ballashire Hall and Canterbury projects were federally funded. The trial court also ruled in the Union's favor on the remaining counts, reasoning that there was insufficient proof to establish the remaining counts for interference torts because the Union's qualified privilege defeated these other claims.

Lowe filed a timely notice of appeal, and the Union and Darling filed a timely notice of cross-appeal.

We first address Lowe's motion to strike the Union's entire brief. Lowe contends that the Union attempted to improperly supplement the record on appeal by including documents and matters not before the trial court in the appendix to the Union's response brief and in the argument contained in the Union's response brief. The Union filed a motion to supplement the record with this material consisting of transcripts from the federal court proceedings. The Union argues that this material was presented to the trial court. Having carefully reviewed the record on appeal, this court now denies both motions. Supreme Court Rule 329 provides in part that "[a]ny controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that

court and the record made to conform to the truth." 134 Ill.2d R. 329. Here, the Union asks this court to settle this controversy. We are not in a position to know what occurred in the trial court absent support in the record before us. The record before us does not establish that the material at issue was before the trial court. Therefore, we deny the Union's motion. See *Anderson v. Financial Matters, Inc.*, 285 Ill.App.3d 123, 130, 220 Ill.Dec. 249, 672 N.E.2d 1261 (1996). Thus, we will disregard any material contained in, or attached to, the Union's brief that is not contained in the record prepared for appeal, but we deny Lowe's motion to strike the Union's brief and appendix.

Lowe argues on appeal that the trial court erred by shifting the burden of proof to Lowe regarding the falsity of the Union's statements and the Union's knowledge of the falsity of the statements or reckless disregard of whether the statements were true or false. Lowe also argues that the trial court erred by finding in the Union's favor on the trade libel count.

In reviewing a bench trial, we defer to the trial court's factual findings unless they are against the manifest weight of the evidence. *Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 599, 251 Ill.Dec. 420, 740 N.E.2d 501 (2000). We will not substitute our judgment for that of the trial judge as to the credibility of the witnesses and conflicts in the testimony. *Wildman,* 317 Ill.App.3d at 599, 251 Ill.Dec. 420, 740 N.E.2d 501. However, we review a question of law *de novo. Hendricks v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill.App.3d 800, 247 Ill.Dec. 702, 732 N.E.2d 757 (2000).

In the first appeal in this case, *Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150,*

180 Ill.App.3d 39, 129 Ill.Dec. 300, 535 N.E.2d 1065 (1989) (hereinafter *Lowe I*), this court held that Lowe's trade libel claim must be evaluated under the *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), standards applied in *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582, 591 (1966), and followed by *Krasinski v. United Parcel Service, Inc.,* 124 Ill.2d 483, 125 Ill.Dec. 310, 530 N.E.2d 468 (1988). *Lowe I,* 180 Ill.App.3d at 48, 129 Ill.Dec. 300, 535 N.E.2d 1065. Under this standard, a plaintiff must prove actual malice, that is, that the defendant published defamatory statements "with knowledge of their falsity or with reckless disregard of whether they were true or false." *Linn,* 383 U.S. at 65, 86 S.Ct. at 664, 15 L.Ed.2d at 591. Reckless disregard for the truth includes publishing statements while defendant entertains serious doubts as to the truth of the statements. *Pease v. International Union of Operating Engineers Local 150,* 208 Ill.App.3d 863, 872, 153 Ill.Dec. 656, 567 N.E.2d 614 (1991). The plaintiff must prove actual malice by clear and convincing evidence. *Kessler v. Zekman,* 250 Ill.App.3d 172, 188, 189 Ill.Dec. 932, 620 N.E.2d 1249 (1993). To recover damages, the plaintiff must also prove harm resulting from the defamatory statements. *Linn,* 383 U.S. at 66, 86 S.Ct. at 664, 15 L.Ed.2d at 591. In addition, despite plaintiff's contention to the contrary, a plaintiff also must prove that the statements at issue were false. *Krasinski,* 124 Ill.2d at 490, 125 Ill.Dec. 310, 530 N.E.2d 468. Lowe's citation to *Lowe I* to support its argument that it does not need to prove the falsity of the statements is misplaced. In *Lowe I,* this court's statement, "[t]he underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards" (*Lowe I,* 180 Ill.App.3d at 47-48, 129 Ill.Dec. 300, 535 N.E.2d 1065),

was made to establish that the issue was not preempted by federal law. This statement does not relieve Lowe from its obligation to prove that the statements were, in fact, false. Lowe ignores the following declaration of this court: "While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered." *Lowe I,* 180 Ill.App.3d at 48, 129 Ill.Dec. 300, 535 N.E.2d 1065.

Accordingly, in this case, we must first determine whether the statements at issue were defamatory. There are two types of defamatory statements, defamation *per se* and defamation *per quod. Bryson v. News America Publications, Inc.,* 174 Ill.2d 77, 88, 103, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). Ordinarily, when a statement is defamatory *per se,* damages are presumed, and when a statement is defamatory *per quod,* the plaintiff must prove special damages. *Bryson,* 174 Ill.2d at 88, 103, 220 Ill.Dec. 195, 672 N.E.2d 1207. However, in this case, Lowe must prove damages regardless of which category applies to the Union's statements. See *Linn,* 383 U.S. at 66, 86 S.Ct. at 664, 15 L.Ed.2d at 591. A statement is defamatory *per se* if the words used are obviously harmful to the plaintiff's reputation because they impute to the plaintiff the commission of a criminal act, the lack of ability in a person's performance of his profession or business, or a want of integrity in the discharge of his office or employment. See *Wynne v. Loyola University of Chicago,* 318 Ill.App.3d 443, 451, 251 Ill.Dec. 782, 741 N.E.2d 669 (2000). Here, the harmful nature of the Union's statements was not obvious but required knowledge of an extrinsic fact, that is, that the Ballashire Hall project was federally funded. Therefore, the Union's statements do not fall under the defamation *per se* classification.

However, we do believe that the statements fall under the defamation *per quod* classification. A *per quod* claim applies when a statement is innocent on its face but extrinsic facts make the statement defamatory or where a statement is defamatory on its face but does not fall into one of the *per se* categories. *Bryson,* 174 Ill.2d at 103, 220 Ill.Dec. 195, 672 N.E.2d 1207. The statements the Union published declared, "Lowe Excavating does not pay the prevailing wages and economic benefits for operating engineers which are standard in this area." Certainly, if one knew, as FAMCO's Brei did, that the federally funded Ballashire Hall project required Lowe, by law, to pay prevailing wages and benefits, the Union's statements would be harmful to Lowe's reputation. Therefore, we determine that the statements at issue here were defamatory.

We must now address whether the trial court erred by finding that the statement made by the Union, that "Lowe does not pay prevailing wages and economic benefits," was true. The following facts were uncontroverted. The Ballashire Hall project was a federally funded job. Employers of workers at federally funded jobs were required by federal law to pay prevailing wages. Marshall Lowe, John O'Hagan, and Bradley Brei testified that Lowe paid its employees prevailing wages on the Ballashire Hall project. Further, Lowe's payroll was certified. The Union's only evidence that arguably challenged this testimony established only that Lowe's benefits did not match the Union's point by point and that its wage raises became effective 10 months after the Union's. Although there were differences in the benefits packages, the Union presented no evidence that Lowe did not pay prevailing wages as a whole as required by federal law to its employees, including any

apprentices, at the Ballashire Hall project. Therefore, we determine that the trial court's finding, that Lowe did not prove the Union's statements were false, is against the manifest weight of the evidence.

Lowe also argues that the trial court erred by finding that it did not prove that the Union published the defamatory statements with actual malice. Lowe was required to prove by clear and convincing evidence that the Union published defamatory statements "with knowledge of their falsity or with reckless disregard of whether they were true or false." *Linn,* 383 U.S. at 65, 86 S.Ct. at 664, 15 L.Ed.2d at 591. Reckless disregard for the truth means that the defendant published the statements while *entertaining* serious doubts as to the truth of the statements. *Pease,* 208 Ill.App.3d at 872, 153 Ill.Dec. 656, 567 N.E.2d 614. The following facts were uncontroverted. On the first day of picketing, Brei told Darling that the Ballashire Hall project was a federally funded project, that Lowe's payroll had been certified and sent to the Department of Labor, and that Lowe was paying prevailing wages for that project. Therefore, at that time, Darling at least should have entertained serious doubts as to the truth of the statements contained on the picket signs. Yet, the Union did not stop picketing, at the earliest, until Lowe removed its employees and equipment from the site the following day and its contractual relationship was terminated. Further, it picketed again in September 1988. Thus, the undisputed facts establish that the trial court's finding of lack of proof of actual malice is against the manifest weight of the evidence.

The Union argues that the defamation claim is preempted by federal law. In *Lowe I,* this court rejected this argument, deciding that the defamation claim was not

preempted by federal law, regardless of whether Lowe "paid wages sufficient to meet area standards." *Lowe I,* 180 Ill.App.3d at 47-48, 129 Ill.Dec. 300, 535 N.E.2d 1065. Nothing in the Union's brief persuades us to revisit this issue or to alter the law of the case.

The Union also argues that Lowe's remaining claims for tortious interference with contract, tortious interference with prospective business advantage, and negligent interference with contract are preempted by federal law. Again, in *Lowe I* this court held that "the merits of the case are of only peripheral concern to the NLRB [National Labor Relations Board]." *Lowe I,* 180 Ill.App.3d at 47, 129 Ill.Dec. 300, 535 N.E.2d 1065. Although we discussed cases involving claims of trade libel, we did not limit our holding to Lowe's trade libel claim. Instead, we discussed the broader issue of "whether the National Labor Relations Act (NLRA) deprives a State court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements, or statements made with reckless disregard for the truth." *Lowe I,* 180 Ill.App.3d at 43, 129 Ill.Dec. 300, 535 N.E.2d 1065. Thus, our holding encompassed all of Lowe's claims, since all of the claims were grounded in the same conduct. Accordingly, we need not revisit this issue or alter the law of the case.

We note that, in Lowe's notice of appeal to this court, it indicated that it was challenging the trial court's memorandum of opinion and "partial directed verdict [*sic*]." However, the only claim Lowe discusses in its brief is the claim for trade libel. In its reply brief, Lowe makes only passing reference to the other claims of tortious interference with contract, tortious interference with prospective economic advantage, and negligent interference with

contract. However, Lowe made no argument citing authority with respect to these claims. Lowe's passing reference to these other claims without argument or citation to authority is insufficient to preserve this issue on appeal. 177 Ill.2d R. 341(e)(7) (argument portion of brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on" and "[p]oints not argued are waived"). Accordingly, we express no opinion on the trial court's rulings on these claims. See *Miller v. Rosenberg,* 196 Ill.2d 50, 56, 255 Ill.Dec. 464, 749 N.E.2d 946 (2001).

Next, Lowe argues that the trial court erred by excluding evidence regarding damages caused by the Union's September 1988 picketing. The Union claims that the trial court's decision to exclude this evidence was not an abuse of discretion. We agree with the Union. Supreme Court Rule 219(c) authorizes a trial court to impose a sanction on a party who unreasonably fails to comply with the court's discovery rules or orders. 166 Ill.2d R. 219(c). We will not disturb a trial court's decision to exclude evidence as a sanction absent an abuse of discretion. See *In re Marriage of Booher,* 313 Ill.App.3d 356, 359, 245 Ill.Dec. 873, 728 N.E.2d 1230 (2000). To determine if a trial court abused its discretion by issuing a sanction, we must consider the following factors: (1) the surprise to the adverse party, (2) the prejudicial effect of the proffered evidence, (3) the nature of the evidence, (4) the diligence of the adverse party in seeking discovery, (5) the timeliness of the adverse party's objection to the evidence, and (6) the good faith of the party offering the evidence. No single factor is determinative. *Booher,* 313 Ill.App.3d at 359-60, 245 Ill.Dec. 873, 728 N.E.2d 1230.

Here, Lowe waited until the beginning of the trial to inform the Union that it was claiming an additional $18,750 in damages caused by the September 1988 picketing. Lowe now explains that Brei's lack of cooperation caused its delay in disclosing the amount of damages. Yet, Lowe acknowledges that its counsel forgot to ask Marshall Lowe about the damages at issue, used figures that were available 12 years earlier to calculate these damages, failed to subpoena Brei, and failed to disclose the amount of the claimed damages despite the Union's prior requests. Further, the admission of the proffered evidence during the trial did not leave the Union with time to verify Lowe's claim, causing unfair prejudice to the Union. Therefore, we determine that the trial court did not abuse its discretion by excluding the evidence regarding damages caused by the September 1988 picketing.

Next, Lowe argues that the trial court erred by excluding evidence of its attorney fees as a measure of punitive damages. Although punitive damages are generally disfavored because of their penal nature, punitive damages may be awarded where, as here, the defendant committed a tort with actual malice. See *E.J. McKernan Co. v. Gregory,* 252 Ill.App.3d 514, 535-36, 191 Ill.Dec. 391, 623 N.E.2d 981 (1993). In addition, this court has previously stated that a plaintiff's attorney fees may be included in the amount of the award of punitive damages. See *E.J. McKernan Co.,* 252 Ill.App.3d at 536, 191 Ill.Dec. 391, 623 N.E.2d 981. However, in the absence of a statutory provision authorizing an award of attorney fees, attorney fees cannot be awarded as a separate entity distinct from punitive damages. *E.J. McKernan Co.,* 252 Ill.App.3d at 546, 191 Ill.Dec. 391, 623 N.E.2d 981. Accordingly, the trial court abused its discretion by excluding evidence of Lowe's attorney fees in support of its punitive

damages claim. On remand, the trial court should consider this evidence if it decides to award punitive damages.

Finally, we address the Union's argument on cross-appeal. The Union argues that the trial court erred in denying its petition for costs under section 5-118 of the Code of Civil Procedure. 735 ILCS 5/5-118 (West 1998). Section 5-118 provides for an award of costs to the prevailing party in a civil case. 735 ILCS 5/5-118 (West 1998). However, with the determinations made in this disposition, the Union is no longer the prevailing party. Therefore, the trial court's denial of the Union's petition for costs is affirmed.

For the foregoing reasons, we reverse the trial court's ruling in the Union's favor on the trade libel count and its exclusion of evidence of Lowe's attorney fees for purposes of determining punitive damages. We affirm the trial court's ruling in the Union's favor on Lowe's remaining claims for tortious interference with contract, tortious interference with prospective business advantage, and negligent interference with contract. We further affirm the trial court's exclusion of the evidence of damages related to the September 1988 picketing and its denial of the Union's petition for fees, and we remand this cause for further proceedings regarding damages.

The judgment of the circuit court of McHenry County is affirmed in part and reversed in part, and the cause is remanded.

Affirmed in part and reversed in part; cause remanded.

GROMETER and CALLUM, JJ., concur.

[LOGO]

STATE OF ILLINOIS APPELLATE
COURT SECOND DISTRICT

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APPELLATE COURT
BUILDING
ELGIN, ILLINOIS
60120-5558

Appeal from the Circuit Court of County of McHenry

Trial Court No.: 88CH034

THE COURT HAS THIS DAY, 02/22/02, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-00-1363

Lowe Excavating Co. v. International Union of Operating Engineer

Upon consideration of the petition for rehearing filed by defendant-appellee, the petition for rehearing is hereby denied and the enclosed modified opinion upon denial of the petition for rehearing is filed this date.
(McLaren, Grometer, Callum, JJ.)

Robert J. Mangan
Clerk

cc: Smetana & Avakian
Gerard C. Smetana
Michael E. Avakian
Baum, Sigman, Auerbach, Pierson,
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R. Mark Gummerson

535 N.E.2d 1065

Appellate Court of Illinois,
Second District.

LOWE EXCAVATING COMPANY, Plaintiff-Appellant,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 150, et al., Defendants-Appellees.

No. 2-88-1005.

March 3, 1989.

David W. McArdle, Zukowski, Rogers & Flood, Crystal Lake, Gerard C. Smetana, argued, Abramson & Fox, Chicago, for Lowe Excavating Co., Inc.

Louis E. Sigman, Dale D. Pierson, argued, Baum & Sigman, Ltd., Chicago, R. Mark Gummerson, argued, Harold C. McKenney, Holmstrom & Green, Crystal Lake, for Intern. Union of Operating Engineers Local No. 150, Robert Darling.

Justice McLAREN delivered the opinion of the court:

Plaintiff appeals from the interlocutory order entered by the circuit court of McHenry County on October 11, 1988. This order denied plaintiff's request for a preliminary injunction due to a finding of Federal preemption of the issues. The trial court held that plaintiff's request for a preliminary injunction enjoining defendants from picketing with placards relating to area standards, when such placards allegedly contained statements which were knowingly false or made in reckless disregard for the truth, must be denied as this area is preempted by Federal law. We reverse.

Plaintiff, Lowe Excavating Company (Lowe), is an Illinois corporation engaged in excavating and site preparation. Plaintiff entered into a contract with FAMCO Corporation, a general contractor, agreeing to provide labor and services for a Federal housing project known as Canterbury Place. During the fall of 1987, the defendant, International Union of Operating Engineers Local No. 150 (union), attempted to persuade plaintiff to recognize the union for collective bargaining purposes. This attempt failed. On February 15, 1988, plaintiff received a mailgram from the codefendant and business agent for the union, Robert Darling. The mailgram stated that after a careful investigation of plaintiff's policies regarding payment to employees, the union determined that plaintiff was not meeting the area standards on this project. On February 15, 1988, defendant also began picketing the Canterbury Place jobsite carrying placards that stated:

"NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS, WHICH ARE STANDARD IN THIS AREA OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY
LOCAL 150
International Union of Operating Engineers, AFL-CIO"

As a result of the picketing, FAMCO ordered Lowe off the jobsite on February 17, 1988. The defendant ceased picketing at that time.

On March 22, 1988, Lowe employees elected the Congress of Industrial Unions (CIU) as its representative for collective bargaining purposes. The National Labor Relations Board certified CIU as agent, and Lowe and CIU signed a collective bargaining agreement on August 15,

1988. This agreement was made retroactive to April 15, 1988, and provided that Lowe would pay wages equal to or higher than others in the area.

On September 27, 1988, plaintiff received a telegram from defendant reiterating the claims made in the mailgram of February 15. This telegram was limited to a jobsite in Crystal Lake, Illinois, at which the plaintiff was performing excavation and site preparation services. On September 28, 1988, defendant began picketing the Crystal Lake site and also resumed picketing at the Canterbury Place jobsite. The placards displayed by the defendant contained the identical language that appeared during the February picket. As a result of the picketing, Lowe was ordered off the Crystal Lake jobsite.

Plaintiff initially filed a complaint on February 17, 1988, seeking a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining the defendant from engaging in allegedly false picketing at a jobsite where plaintiff was working. Plaintiff also sought damages for tortious interference with prospective economic advantage. On February 18, 1988, defendant filed a petition for removal to Federal district court claiming that plaintiff's complaint seeks redress for an unfair labor practice and therefore exclusive jurisdiction rests with the Federal court. On June 10, 1988, defendant's petition was denied and the case remanded to State court. The Federal court stated that plaintiff's complaint did not on its face contain a Federal claim and therefore the court was without subject matter jurisdiction. This order was not appealed.

Plaintiff filed an amended complaint on July 22 and a second amended complaint on August 4, 1988. Plaintiff's

second amended complaint included counts for libel and slander in addition to tortious interference and requested injunctive relief. Defendant filed a motion to dismiss pursuant to section 2-619(a)(1) of the Code of Civil Procedure stating that the court had no subject matter jurisdiction. (Ill.Rev.Stat.1987, ch. 110, par. 2-619(a)(1).) The lower court granted defendant's motion to dismiss and gave plaintiff leave to amend its complaint.

Plaintiff filed its third amended complaint alleging tortious interference with contractual relations, tortious interference with prospective economic advantage, trade libel and negligent interference with contract. Plaintiff sought both injunctive relief and damages. Defendant again filed a motion to dismiss pursuant to section 2-619(a)(1) stating plaintiff's claims were barred due to the court's lack of jurisdiction. Plaintiff also filed a motion for a temporary restraining order and a preliminary injunction. Plaintiff sought to enjoin the defendant from carrying placards that stated plaintiff did not pay wages consistent with the standards in the area. Plaintiff also sought to enjoin the defendant from communicating to others that Lowe is nonunion. Plaintiff alleged that defendant knew these statements were false. On October 11, 1988, the trial court entered an order denying defendant's motion to dismiss. The court also granted plaintiff's motion for a temporary restraining order in part. The court entered a temporary restraining order prohibiting defendant from disseminating the claim that Lowe was nonunion. However, the court denied plaintiff's request to enjoin defendants from picketing with placards referring to area standards on the basis of Federal preemption. Plaintiff appeals this portion of the court's order.

The sole issue on appeal is whether the National Labor Relations Act (NLRA) deprives a State court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements, or statements made in reckless disregard for the truth.

Plaintiff's contention is that the trial court erred in denying its request for a preliminary injunction due to Federal preemption. Generally, the elements which a trial court should consider in deciding whether to issue a preliminary injunction are: (1) the possibility of irreparable harm to the plaintiff's legal rights pending the outcome of trial if the preliminary injunction does not issue; (2) the potential irreparable harm to the defendant's rights if it does; and (3) the plaintiff's likelihood of success on the merits. (*Kanter & Eisenberg v. Madison Associates* (1987), 116 Ill.2d 506, 510, 108 Ill.Dec. 476, 508 N.E.2d 1053.) On appeal from the grant or denial of a preliminary injunction an appellate court is to consider whether the circuit court abused its sound discretion in evaluating these considerations and granting or denying the preliminary injunction. *Chicago Health Clubs, Inc. v. Picur* (1988), 124 Ill.2d 1, 7-8, 124 Ill.Dec. 87, 528 N.E.2d 978.

The issue before this court, however, does not rest on whether the trial court abused its discretion in denying plaintiff's request for an injunction. The trial court found that it was preempted from exercising its discretion and therefore did not analyze the elements set forth above. This court is to determine if this refusal to exercise discretion was proper.

Initially, we note that the issue of preemption was not decided by the Federal district court. Defendant filed a petition for removal on February 18, 1988, claiming that

plaintiff's complaint sought redress for an unfair labor practice and therefore jurisdiction rested with the Federal court. Defendant's petition was denied and the case remanded back to the circuit court. The Federal court concluded that plaintiff's complaint did not on its face state a cause of action under Federal law and therefore the court lacked subject matter jurisdiction. The court did not consider the question of preemption.

There are two types of Federal preemption over State torts regarding employee/employer or labor relationships. The first type of preemption that pertains to this area is Federal common-law preemption under section 301 of the Labor Management Relations Act (Act) (29 U.S.C. § 185(a) (1982)). Section 301 provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *." (29 U.S.C. § 185(a) (1982).)

Federal labor law preempts State tort actions which are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." (*Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 220, 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206, 221.) The key inquiry is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213, 105 S.Ct. at 1912, 85 L.Ed. at 216.

The case at bar cannot be preempted by section 301 of the Act because there is no labor contract to interpret in this case. The State tort claims in this case are not

"substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." Therefore, evaluation of the tort claim cannot be intertwined with the terms of a labor contract. The only contract in force is the one between Lowe and UIC. That contract is not at issue here. This case is not preempted by Federal case law.

The second type of Federal preemption requires preemption whenever the conduct complained of is "arguably subject" to the jurisdiction of the National Labor Relations Board (NLRB). (See *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775.) However, even if the claim involves State torts that are "arguably subject" to the jurisdiction of the NLRB, the court in *Garmon* noted an exception to preemption when the State's interests outweigh any peripheral Federal concern or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon,* 359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782, citing *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Russell* (1958), 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030.

Defendant argues that area standards picketing is protected under section 7 of the NLRA. The union also cites authority for the proposition that the area standards protest does not lose protection simply because the employer presents evidence that establishes its labor costs met or exceeded the standard. Since the activity in question is "arguably protected" by the NLRA, defendant, citing *Garmon,* contends that preemption must apply. This

court agrees with defendant and finds this activity is "arguably" protected. However, determining that the activity is arguably protected or prohibited by the NLRA does not dispose of the issue. We must then look to the exception to preemption set forth by the Supreme Court in *Garmon.*

The exception to preemption, as set forth in *Garmon,* is essentially a balancing of interests. On the one hand we have the Federal interest in establishing a uniform set of rules dealing with labor disputes. On the other hand, we have the interests of the State in protecting its citizens from conduct that it deems harmful or inappropriate. When balancing the competing interests, we look at the risk of State interference with the national labor policy if the State is allowed to adjudicate the matter in controversy. (See *Vaca v. Sipes* (1967), 386 U.S. 171, 180, 87 S.Ct. 903, 911, 17 L.Ed.2d 842, 852; *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill.App.3d 996, 1000, 86 Ill.Dec. 66, 474 N.E.2d 1263.) If the risk of interference is minimal and the activity in question is only a peripheral concern of the Act, the matter is not preempted, and the State may proceed. *Garmon,* 359 U.S. at 243-44, 79 S.Ct. at 778-79, 3 L.Ed.2d at 782.

The United States Supreme Court discussed the Federal interests and stated:

> "We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." (*Garmon,* 359 U.S. at 242, 79 S.Ct. 778, 3 L.Ed.2d at 781.)

Several separate and distinct tribunals with a diversity of procedures are as sure to produce inconsistent decisions as are different substantive rules of law. (*Garmon,* 359 U.S. at 243, 79 S.Ct. at 778, 3 L.Ed.2d at 782, citing *Garner v. Teamsters Chauffeur & Helpers Local Union No. 776* (1953), 346 U.S. 485, 490-91, 74 S.Ct. 161, 165-66, 98 L.Ed. 228, 239-40.) The State's interest in this matter is to protect its citizens from malicious defamation by others and to redress any injury that may have been caused by this conduct. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 341, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789, 806.

This exception to preemption was also discussed in the case of *Linn v. United Plant Guard Workers of America, Local 114* (1966), 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582. In *Linn,* the plaintiff was an officer of an employer. The defendant was a union that sought to unionize the employer. Plaintiff filed a complaint alleging that the union published several defamatory remarks during a union organizing campaign. These remarks included statements that plaintiff was "lying" to company employees and had "robbed" them of pay increases. The court stated that while there is considerable leeway with regard to defamatory statements made during labor disputes, even the NLRB does not allow a party to intentionally injure another by publishing defamatory material known to be false. (*Linn,* 383 U.S. at 61, 86 S.Ct. at 662, 15 L.Ed.2d at 589.) The court found that the State's interest outweighed the Federal concerns and stated that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*" (*Linn,* 383

U.S. at 62, 86 S.Ct. at 663, 15 L.Ed.2d at 589), and, therefore, the claim was not preempted.

Defendant argues that *Linn* is distinguishable on the basis of the untruths that were published. Defendant alleges that *Linn* involves statements about "lying" and "robbing," "the stuff of which libel claims are traditionally made." Defendant asserts that since the case at bar deals with untruths involving area standards, the *Linn* rationale does not apply. This court finds no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis.

In *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill.App.3d 996, 86 Ill.Dec. 66, 474 N.E.2d 1263, the plaintiff alleged that a letter from the employer's agent to the union was defamatory in nature. The court noted that the NLRB would only be peripherally concerned with this type of injury. (130 Ill.App.3d at 1001, 86 Ill.Dec. 66, 474 N.E.2d 1263.) The State court would be concerned with, *inter alia,* the nature and extent of the injured plaintiff's reputation, the defendant's mental state as it pertains to the possible award of punitive damages and mental pain and suffering. (130 Ill.App.3d at 1001, 86 Ill.Dec. 66, 474 N.E.2d 1263.) The court did recognize that adjudicating the truth or falsity of the communication may cause some overlap with Federal policy favoring resolution of these matters in arbitration. (130 Ill.App.3d at 1001, 86 Ill.Dec. 66, 474 N.E.2d 1263.) However, the court held that the matter was not preempted and stated that "the protection of an individual's interest in his reputation is a deep and traditional concern of the State of Illinois." (130 Ill.App.3d at 1001, 86 Ill.Dec. 66, 474 N.E.2d 1263.) In conclusion, the court stated that "the preemption doctrine should not be used as a shield to protect malicious falsehoods where

the State has an overriding interest in protecting its citizens from the damage which these falsehoods inevitably cause." 130 Ill.App.3d at 1001, 86 Ill.Dec. 66, 474 N.E.2d 1263.

The Illinois Supreme Court has also held that an action in State court for defamation is not preempted by the jurisdiction of the NLRB. (See *Krasinski v. United Parcel Service, Inc.* (1988), 124 Ill.2d 483, 125 Ill.Dec. 310, 530 N.E.2d 468.) In *Krasinski,* the plaintiff filed suit alleging wrongful discharge and defamation based on statements indicating he had stolen some equipment. (124 Ill.2d at 486, 125 Ill.Dec. 310, 530 N.E.2d 468.) The trial court, asserting Federal preemption, dismissed plaintiff's defamation claim and plaintiff appealed. (124 Ill.2d at 488, 125 Ill.Dec. 310, 530 N.E.2d 468.) Defendant argued that plaintiff's claims arose out of unfair labor practices and were, therefore, preempted by the exclusive jurisdiction of the NLRB. (124 Ill.2d at 492-93, 125 Ill.Dec. 310, 530 N.E.2d 468.) The supreme court indicated that simply because "this claim could arguably be characterized as an unfair labor practice does not require preemption in order to protect the exclusive jurisdiction of the NLRB." (124 Ill.2d at 493, 125 Ill.Dec. 310, 530 N.E.2d 468.) The court concluded by discussing the applicability of *Linn* and holding that a State claim for malicious publication of libelous statements during a labor dispute is not preempted by the exclusive jurisdiction of the NLRB. 124 Ill.2d at 495, 125 Ill.Dec. 310, 530 N.E.2d 468.

The case at bar fits into the exceptions carved out by the Supreme Court in *Garmon.* The issues in deciding the merits of the case are of only peripheral concern to the NLRB. Defendant contends that the issue presented is whether Lowe was in fact paying area standards. To

decide this would force the State court to interpret or enforce the NLRB's area standards doctrine. Defendant states that enforcing the area standards doctrine is of primary importance to the NLRB and, therefore, the exception to preemption does not apply.

The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered. These issues are of only peripheral concern to the NLRB. The NLRB may be concerned with "area standards," but this concern is outweighed by the State's interest in protecting its citizens from malicious publication of defamatory material. This cause of action fits into the exception carved out by *Garmon,* and, therefore, the State court is not preempted by the exclusive jurisdiction of the NLRB.

Defendant next contends that the State of Illinois has in force an anti-injunction act that is applicable, and thus the State court cannot enjoin the union from peaceful picketing. (See Ill.Rev.Stat.1987, ch. 48, par. 2a.) This act may or may not apply. That issue is not before this court at this time. The trial court did not reach the question of Illinois law applying to this case. The court ruled that it could not consider these substantive rules due to Federal preemption. Therefore, the question of whether or not the anti-injunction act applies in this case is not ripe for review.

In conclusion, we find that the cases of *Linn* and *Krasinski* are controlling in this matter. We hold that this case falls within the exception to preemption noted by the United States Supreme Court in *Garmon* and is also not preempted by Federal case law. Therefore, we remand this case to the circuit court of McHenry County to review the plaintiff's motion for a preliminary injunction consistent with this opinion.

The judgment of the circuit court of McHenry County is reversed, and the cause is remanded.

REVERSED AND REMANDED.

LINDBERG and WOODWARD, JJ., concur.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT McHENRY COUNTY, ILLINOIS

LOWE EXCAVATING COMPANY,	)	
Plaintiff	)	CASE NO. 88 CH 34
vs.	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 and COLIN DARLING,	)	
Defendant	)	

MEMORANDUM OPINION OF THE TRIAL COURT AND ORDER

(Filed Oct. 19, 2000)

This cause has been under advisement by the Court after an eight day trial before the Court without a jury on certain counts of the Third Amended Complaint of the Plaintiff, Lowe Excavating Company (hereinafter referred to as "Lowe") filed on September 29, 1988 and the answer and affirmative defenses of the Defendants, International Union of Operating Engineers, Local 150 (hereinafter referred to as "Local 150") and Colin Darling filed on November 27, 1991.

The cause proceeded to trial on the tort counts filed by Lowe against Local 150 and Colin Darling. The claims proceeding to trial were:

COUNT II – DAMAGE CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP,

COUNT IV – DAMAGE CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.

COUNT V – DAMAGES FOR TRADE LIBEL.

COUNT VI – DAMAGES FOR NEGLIGENT INTERFERENCE WITH CONTRACT.

At the conclusion of Lowe's case, the Court granted certain of Local 150 and Colin Darling's Motions for directed findings as follows:

1. Granted a directed finding in favor of Colin Darling aka Robert Darling in his individual and personal capacity as to all counts of the Third Amended Complaints;

2. Granted a directed finding in favor of Local 150 as to the claim for negligent interference with contractual relationship (Count VI);

3. Granted a directed finding in favor of Local 150 on all counts only as to the damage issue relating to "Woman's Health Care" and "Crystal Enterprises" jobs as well as a directed finding being granted on the "FAMCO" job solely related to the September, 1988 evidence presented.

In addition to the tort claims, Lowe is also requesting the Court a permanent injunction against Local 150 prohibiting Local 150 from making representations to the public that Lowe is "non-union".

Over the course of the eight day bench trial, the Court listened to and observed fourteen witnesses testify, several of them more than once, and received into evidence numerous exhibits. The Court has also listened to oral arguments of counsel and further has reviewed all of the

pertinent pleadings and other written submissions from counsel and reviewed the citations of caselaw and statutory authorities.

The Court will not attempt to recite the evidence presented at this lengthy bench trial as it is contained in the record and is known to the parties. The Court may refer to such matters in evidence as are necessary to an understanding to the court's decision.

This cause was originally filed in early 1988. Without humorous intention, the Court believes that the best way to describe the path or journey of this cause would be to describe it as having been around the block a couple of times.

In 1988, there were several hearings and arguments concerning mainly injunctive issues. In late 1988, this Court denied and/or lifted certain injunctive relief requested by Lowe. An appeal was taken from this Court's Order to the appellate Court of Illinois, 2nd District. In an Opinion filed on March 3, 1989, the Appellate Court reversed the decision of this court and remanded the case with directions for the trial court to review Lowe's Motion for Preliminary Injunction consistent with the Appellate Court's decision. After the decision of the Appellate Court was filed apparently attempts were made to have that opinion reviewed by the Illinois Supreme Court and in the Federal Courts. In addition to this particular lawsuit, it appears the parties also had proceedings arising out of this factual dispute before the National Labor Relations Board and in the Federal Courts.

This Court believes that it is important to note that at no time between the time that the mandate of the 2nd District Appellate Court was returned in 1989 until the

time that we proceeded to trial on all issues in the case in the year 2000 did Lowe, or for that matter Local 150 ever ask for a further hearing on the issuance of a preliminary injunction in this cause.

In any event, after many years of litigation in many forums with much discovery having been completed and many pre-trial motions having been presented and heard, the cause proceeded to a trial before the court in the year 2000. The Court believes it is appropriate to note at this point that although this matter arises in the context broadly described as a "labor dispute" which at times has involved heightened emotions and beliefs that counsel for both sides and the parties have conducted themselves in court in the most professional and courtesy [sic] manner towards the Court and towards each other. I commend everyone for their civility.

The decision of the Appellate Court of Illinois, 2nd District in *LOWE EXC. CO. vs. INT'L UNION of OP ENG.*, 180 Ill App 3rd 39 535 N.E. 2nd 1065 (2nd Dist, 1989) is the law of the case. The issue before the appellate Court was whether the trial court had erred in its ruling on October 11, 1988 which denied Lowe's request for preliminary injunction against Local 150 due to a finding of Federal Preemption on the issues.

The Appellate Court, in *LOWE, supra*, 180 Ill App 3rd at 41 states as follows:

> "The trial court held that plaintiff's request for a preliminary injunction enjoining defendants from picketing with placards relating to area standards, when such placards allegedly contained statements which were knowingly false or made in reckless disregard for the truth, must be denied

> as this area is preempted by Federal law. We reverse."

This case primarily revolves around a picketing placard used by Local 150. The text of this placard that is at the center of the proceedings was set forth by the Appellate Court in *LOWE, supra*, 180 Ill App 3rd at 41 as follows:

"NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY LOCAL 150
International Union of Operating Engineers, AFL-CIO"

Further, in its opinion, the 2nd District Appellate Court in *LOWE, supra,* 180 Ill App 3rd at 43, formed the issue before it as follows:

> "The sole issue on appeal is whether the National Labor Relations Act (NLRA) deprives a State court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements, or statements made in reckless disregard for the truth."

Later, in its opinion, the 2nd District Appellate Court in *LOWE supra*, 180 Ill App 3rd at 47-48 stated as follows:

> "The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainty not

> the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered. These issues are of only peripheral concern to the NLRB. The NLRB may be concerned with "area standards", but this concern is outweighed by the State's interest in protecting its citizens from malicious publication of defamatory material. This cause of action fits into the exception carved out by *GARMEN*, and, therefore, the State court is not preempted by the exclusive jurisdiction of the NLRB."

Finally, in the conclusion of its opinion, the 2nd District Appellate Court in *LOWE, supra*, 180 Ill App 3rd at 48 states:

> "In conclusion, we find that the cases of *Linn* and *Krasinski* are controlling in this matter. We hold that this case falls within the exception to preemption noted by the United States Supreme Court in *Garmen* and is also not preempted by Federal case law. Therefore, we remand this case to the circuit court of McHenry County to review The plaintiff's motion for a preliminary injunction consistent with this opinion."

The primary federal case upon which the 2nd District Appellate Court in *LOWE*, based its decision in its ruling in this case is *LINN vs. UNITED PLANT GUARD WORKERS*, 383 U.S. 53, 15 L Ed 2nd 582, 86 S Ct 657 (1966). In *LINN, supra*, the United States Supreme Court was considering whether an action filed in the United States District Court for damages for allegedly defamatory statements contained in leaflets distributed by the Union during its organization campaign brought by an officer of the employer against the Union seeking the [sic] organize the

employers workers should be dismissed because exclusive jurisdiction was with the National Labor Relations Board.

In *LINN, supra*, 15 L Ed 2nd 587, the United States Supreme Court framed the issue before it as follows:

> "The question before us has been a recurring one in both state and federal tribunals, involving the extent to which the National Labor Relations Act, as amended, supersedes state law with respect to libels published during labor disputes. Its resolution entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against defamatory (383 US 58) attacks. The problem is aggravated by the fact that the law in many States presumes damages from the publication of certain statements characterized as actionable per se. Labor disputes are ordinarily healed [sic] affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituparations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. *Cafeteria Union v. Angelos*, 320 US 293, 295, 88 L ed 58, 59, 64 S Ct 126 (1943). It is therefore necessary to determine whether libel actions in such circumstances might interfere with the national labor policy."

Further in its consideration of the issue before it in *LINN, supra*, 15 L Ed 2nd at 589, the United States Supreme Court stated as follows:

> "In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. See *Maryland Drydock Co. vs. Labor Board*, 183 F2d 538 (CA 4th Cir 1950). In such case the other issuing such material forfeits his protection under the Act. *Walls Manufacturing Co.*, 137 NLRB 1317, 1319 (1962).
>
> In the light of these considerations it appears that the exercise of state jurisdiction here would be a "merely peripheral concern of the Labor Management Relations Act." Provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that "an overriding state interest" in protecting its residents from malicious libels should be recognized in these circumstances."

In *LINN, supra,* 15 L Ed 2nd at 591, the United States Supreme Court stated its ruling as follows:

> " . . . We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage
>
> *The standards enunciated in New York Times Co. vs. Sullivan,* 376 US 254, 11 L ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a

state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwarranted intrusion upon free discussion envisioned by the Act.

As we have pointed out, certain language characteristic of labor disputes may be held actionable per se in some state courts. These categories of libel have developed without specific reference to labor controversies. However, even in those jurisdictions, the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle. We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be followed. If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial. Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."

In *KRASINSKI vs. UNITED PARCEL SERVICE, INC.*, 124 Ill 2nd 483, 530 N.E. 2nd 468, 473 (1988), the Illinois Supreme Court acknowledged the holding of the United States Court in *LINN, supra,* and in particular that a State Court action for libel is not preempted by Federal Law and that the actual malice standards of *NEW*

YORK TIMES vs. SULLIVAN, 376 U.S. 254, 84 S Ct. 710, 11 L Ed 2nd 686 (1964) apply to libel and slander actions arising out of labor disputes. The Appellate Court of Illinois, Second District, in the case of *PEASE vs. INT'L UNION OF OPERATING ENGINEERS,* 208 Ill App 3d 863, 872 (2nd Dist 1991) has stated in a clear and concise manner the burden of proof required of a plaintiff seeking to establish a cause of action for libel in the context of a labor dispute as follows:

> "In order to establish that the alleged defamatory statements were made with actual malice, the plaintiff must prove by clear and convincing evidence that the defendant published the defamatory statements with knowledge that the statements were false or with reckless disregard for their truth or falsity. (*Costello*, 125 Ill 2d at 418-19.) Reckless disregard for the truth maybe [sic] found only where the evidence shows that the defendant, in fact, entertained serious doubts as to the truth of the publication. 125 Ill. 2d at 419."

In the context of the Federal and State caselaw controlling when issues of State tort claim arise in the course of a labor dispute, this Court shall now deal with the specific State tort claims remaining in this case. The remaining tort claims are:

II– Damage claim for Tortuous Interference with Contractual Relationship

IV– Damage claim for Tortuous Interference with Prospective Economic Advantage

V– Damages for Trade Libel

In *HPI HEALTH CARE vs. MT. VERNON HOSP.*, 131 Ill 2nd 145, 154-55 (1989), the Illinois Supreme Court set out the elements generally recognized in the State of Illinois for the tort of intentional interference with existing contractual rights. The Court stated the elements for this tort are:

1. The existence of a valid and enforceable contract between the plaintiff and another;
2. The defendant's awareness of this contractual relation;
3. The defendant's intentional and unjustified inducement of a breach of the contracts;
4. A subsequent breach by the other, caused by the defendant's wrongful conduct;
5. Damages.

The Illinois Supreme Court has also stated the elements for the tort of interference with prospective economic advantage. In *FELLHAUER vs. CITY OF GENEVA*, 142 Ill 2nd 495, 511, (1991) the Illinois Supreme Court set forth the generally recognized elements of the tort of interference with prospective economic advantage as follows:

1. A reasonable expectation of entering in to [sic] a valid business relationship;
2. The defendant's knowledge of the plaintiff's expectancy
3. Purposeful interference by the defendant that prevents the plaintiff's legitimate [sic] from righting into a valid business relationship;

4. Damages to the plaintiff resulting from such interference.

Although the Court has set forth the elements of the two tortuous interference torts, the Court will first address in depth the tort claim of trade libel because a resolution of this aspect of the case may have a direct impact on the resolution of the other two tort claims. As noted to [sic] Lowe's Trial Brief, the defamation (trade libel claim) may become the trigger for the interference torts.

In the context of this case, the Court first must determine what are the elements of trade libel. As previously noted, in its decision in *LINN, supra* 15 L Ed 2nd at 591, the United States Supreme Court held that:

> " . . . We therefore limit the availability of state remedies for libel (383 US 65) to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage."

In *BRYSON vs. NEWS AMERICA PUBLICATIONS, INC.,* 174 Ill 2nd 77 672 N.E. 2nd 1207 (1996), the Illinois Supreme Court speaks at length, but very clearly, about the elements of a defamation action both *per se* and *per quod.* In *BRYSON, supra*, 672 N.E. 2nd at 1214, the Illinois Supreme Court stated:

> "A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with her. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill 2d 1, 10, 180 Ill. Dec. 307, 607, N.E. 2d 201 (1992); Restatement (Second of Torts§ 559 (1977). A statement or publication may be defamatory on its face. However, even a statement

> that is not defamatory on its face may support a cause of action for defamation if the plaintiff has pled extrinsic facts that demonstrate that the statement has a defamatory meaning. See, e.g., *Morrison v. Ritchie & Co.*, 4 Fraser, Sess. Cas. 645 39 Scot.L.Rep. 432 (1902) (report that plaintiff gave birth to twins considered defamatory, where plaintiff proved, as extrinsic fact, that some readers knew that the plaintiff had been married only a month)."

The defamation action is actionable *per se* with regard to certain limited categories of defamatory statements. If a statement is actionable *per se*, the plaintiff need not plead or prove actual damages to the plaintiff's reputation to recover. However, under the holding in *LINN*, *supra*, defamation *per se* actions are not available in the context in a labor dispute. The second type of defamation action is defamation *per quod*. The Illinois Supreme Court in *BRYSON*, *supra*, 672 N.E. at 1221 specifies the circumstances when a cause of action of defamation *per quod* may be brought:

> "A cause of action for defamation *per quod* may be brought in two circumstances. First, a *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face, and resort to extrinsic circumstances is necessary to demonstrate its injurious meaning. To pursue a *per quod* action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill 2d 1, 180 Ill Dec 307, 607 N.E. 2d 201 (1992); *Nittelmen v. Witous*, 135 Ill 2d 220, 233, 142 Ill Dec 232, 552 N.E. 2d 973 (1989).

> A *per quod* action is also appropriate, however, where a statement is defamatory on its face, but does not fail within one of the limited categories of statements that are actionable *per se*. See Mitchell v. Peoria Journal-Star, Inc., 76 Ill App 2d 154, 158-60, 221 N.E. 2d 516 (1966). In such *per quod* actions, the plaintiff need not plead extrinsic facts, because the defamatory character of the statement is apparent on its face and resort to additional facts to discern its defamatory meaning is unnecessary. The action is one for defamation *per quod* simply because the statement does not fall into one of the actionable *per se* categories. In other words, the statement is defamatory on its face, but damage to the plaintiff's reputation will not be presumed. See *Mitchell v. Peoria Journal-Star, Inc.*, 76 Ill App 2d 154, 158-60, 221 N.E. 2d 516 (1966). As with any defamation *per quod* action, the plaintiff must plead and prove special damages to recover."

In the opinion of the Appellate Court of Illinois 2nd District, in *LOWE*, *supra*, 180 Ill App 3d 43 found that the cases of *LINN* and *KRASINSKI*, were controlling with regard to the preemption issue which was the sole issue before the Appellate Court at that time. However, in addition to guidance on the preemption issue, the Illinois Supreme Court in *KRASINSKI*, *supra*, 530 N.E. 2d at 471 does also give guidance to the trial court faced with a defamation claim in a labor relations context:

> " . . . To make out a claim for defamation, the plaintiff must set out sufficient facts to show that the defendants made a false statement concerning him, that there was an unprivileged publication to a third party with fault by the defendant, which caused damage to the plaintiff. (See, e.g.,

> Restatement (Second) of Torts § 558 (1977).) If the defamation claim arises out of an employer-employee relationship, the plaintiff may be confronted with a qualified privilege. To overcome the privilege, the plaintiff has to plead and prove that the statements were made with actual malice. (see, e.g., W. Prosser, Torts § 1155, at 794 (4th ed. 1971); *Colson v. Stieg* (1982) 89 Ill.2d 205, 214, 60 Ill. Dec. 449433 [sic] N.E. 2d 246; *Zeinfeld v. Hayes Freight Lines, Inc.* (1968), 41 Ill. 2d 345, 349; 243 N.E. 2d 217.) "Actual malice" in this context requires the plaintiff to plead and prove that the statement was made with knowledge of its falsity or in reckless disregard of whether it was true or false. (*New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 1 L. Ed. 2d 686, 706; *Colson v. Steig* (1982), 89 Ill. 2d 205, 214, 60 Ill. Dec. 449, 433 N.E. 2d 246.) . . . "

The defamation action before this Court in this cause is defamation is [sic] *per quod*. This is consistent of the principles enunciated in *LINN*, *supra*, and *KRASINSKI*, *supra*, and the statement of *LOWE* in footnote 2, page 5 of the Plaintiff's Trial Brief that *LOWE* is relying on the libel *per quod* decision of the Illinois Supreme Court in *BRYSON*, *supra*.

When analyzing the allegedly defamatory language in a libel *per quod* action, the decisions of the Appellate Courts suggest that words be read in context and given their natural and obvious meaning. *AMERICAN NT'L HOSP. vs. CHICAGO TRIBUNE*, 136 Ill App 3d 1026, 1036 (1st Dist. 2nd Div 1985).

In order for Lowe to be successful in the prosecution of its trade libel count, Lowe must establish by clear and

convincing evidence when Local 150 published the allegedly defamatory language on the picketing placards at the Canterbury Place construction site on February 15, 1988 that:

1. The language of the picketing placard as complained of was a false statement;

2. This statement contained on the picketing placard was made by knowledge of its falsity or in reckless disregard of whether it was true or false;

3. This statement caused damage to Lowe.

For sake of simplicity and economy, the Court will address the damage element first. The only admissible evidence of damage to Lowe relates to the work that Lowe would have completed at the Ballashire Hall portion of the Canterbury Place project in the later half of February or March of 1988. As to his work, Marshall Lowe testified there was about $26,000.00 worth of work performed by another contractor who finished the work after Lowe was removed from the job site. Marshall Lowe further testified that Lowe's profit margin was 18% at the time. Applying the 18% profit margin to the $26,000.00 worth [sic] work performed by the other contractor, the lost profit figure for Lowe would have been $4,680.00. The Court finds Lowe's evidence is sufficiently specific to establish that Lowe lost profits in the amount of $4,680.00 in connection with the Ballashire Hall job in or about February, 1988. If Lowe is able to meet its burden with regard to the other elements of the tort of trade libel, this proof is sufficient to establish damages in the amount of $4,680.00.

While the actual damage amount is relatively small, especially when compared to the time, energy and expense

of litigation that both sides have incurred in this case, not mentioned related litigation over the past twelve years, it is obvious both parties consider the issues involved in this litigation to be very important. Based upon comments of counsel, it appears that this case has potential impact beyond the four corners of this individual dispute. It is obvious to the Court that counsel on both sides of this dispute have worked very hard and diligently to present the case in the light most favorable to their respective clients in the factual context of this which has been ongoing for over twelve years. There was great deal of evidence presented by counsel for Lowe and also by counsel for Local 150 concerning what audits and other financial reports prepared by financial experts for both sides prepared after February 15, 1988, mostly in late 1988 or early 1989 which gave much information about the wages and benefits that Lowe paid to its employees at various times in 1988. However, this Court believes that the specific facts of this case required the Court to focus solely on the question of what Lowe's wages and benefits to its employees were at or before February 15, 1988.

There is testimony in the record as to discussions between Local 150 and Lowe in late 1987 and early 1988. It must be remembered that the trial in this case is occurring in the year 2000 which is twelve years after these events actually occurred in 1988. The Court heard and observed the witnesses as they testified concerning these conversations and meetings. The Court believes that the testimony of both of the main witnesses to these meetings, Colin Darling and Marshall Lowe was generally credible. In fact, the Court agrees with counsel [sic] with Lowe that the testimony of Marshall Lowe was very credible and honest. When Marshall Lowe could not recall or didn't

remember exactly what was said he stated that he did not recall. Also when Marshall Lowe was asked a question, it appeared to the Court that he answered the question truthfully no matter whether the answer was favorable or unfavorable to Lowe's position in this case.

For Lowe to be to [sic] successful on the trade libel count, Lowe had to focus its case almost entirely on the Ballashire Hall portion of the Canterbury Place project and convince the trier of fact that at the time that Local 150 began the picketing at the job site on February 15, 1988 that Local 150 knew or should have known that the Ballashire Hall portion of the Canterbury Place project was a federally funded project and that in the face of this knowledge or in reckless disregard of the truth or falsity of its statements published the language contained on the picketing placard. Based upon the Court's analysis of all the evidence, the Court finds that Lowe has not established by the standards of clear and convincing evidence that on or about February 15, 1988 the statements concerning prevailing wages and/or area standards were false. Further, even if the statements were false, that Lowe has failed to prove that Local 150 made those statements on or about February 15, 1988 knowing that the statements were false or in reckless disregard of whether the statements were true or false. This Court specifically finds that there is no evidence in the record that would establish by a standard of clear and convincing evidence that there were any statements or information given to Local 150 by Lowe employees or by Marshall Lowe before February 15, 1988 that gave Local 150 specific information that the Ballashire Hall portion of the Canterbury Place project was a federally funded project. The evidence showed that Lowe had been working at Canterbury Place for a period of two

years before this incident beginning in 1986. There was testimony in the record that Marshall Lowe at some point in early 1988 told Colin Darling that Lowe had a federally funded project coming in the future. However, Colin Darling testified that Marshall Lowe would not tell him where the federally funded project was. On cross-examination Marshall Lowe testified that the Ballashire Hall portion of the Canterbury Place project was the first, or one of the first prevailing wage project [sic] that Lowe Excavating ever did and also that prior to working on the Ballashire Hall project that Lowe never paid any employees the federal or state prevailing wage rate. The evidence also indicates that with respect to the mailgram that Local 150 sent to Marshall Lowe late in the afternoon on February 12, 1988 and which the Court agrees with Lowe was probably calculated by the Union to make it very difficult for Lowe to reply to Local 150's mailgram, it is none the less true that Lowe did not make any serious attempt to contact Local 150 prior to the commencement of the picketing at the Canterbury Place job site on the morning of February 15, 1988.

The Court finds in favor of Local 150 and against Lowe on Count V – Damages for Trade Libel.

In regard to Count II – Damage Claim for Tortuous Interference with Contractual Relationship and Count IV – Damage Claim for Tortuous Interference with Prospective Economic Advantage, it is the belief of this Court that because this Court has found that Lowe has not proved its claim for trade libel against Local 150, there can be no proof sufficient to establish the interference torts since the qualified privilege asserted by Local 150 defeats these claims.

Therefore, the Court finds in favor of Local 150 and against Lowe on Count II – Damage Claim for Tortuous Interference with Contractual Relationship and on Count IV – Damage Claim for Tortuous Interference with Prospective Economic Advantage.

As to the request for injunctive relief, based upon this Court's finding as to the defamation count and also because of the total lack of any evidence that there is any current or ongoing need for the Court to grant the extraordinary relief of a permanent injunction, the request for injunctive relief is denied.

THEREFORE, IT IS ORDERED that judgment is granted in favor of Defendant, International Union of Operating Engineers, Local 150 and against Plaintiff, Lowe Excavating Company as to all claims and causes of action contained in the Plaintiff's Third Amended Complaint.

IT IS FURTHER ORDERED that there is no just reasons to delay enforcement or appeal of this order.

ENTERED October 19, 2000

ENTER /s/ Michael J. Sullivan
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CIRCUIT JUDGE

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No. 93555 – Lowe Excavating Company, respondent, v. International Union of Operating Engineers Local No. 150, petitioner, Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 21, 2002.

(2)

Supreme Court, U.S.
FILED
OCT 23 2002
OFFICE OF THE CLERK

No. 02-346

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *and* COLIN DARLING,

Petitioners,

v.

LOWE EXCAVATING CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF IN OPPOSITION TO THE PETITION

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

No. 02-346

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Lowe Excavating Co. ("Lowe"), submits its Opposition to the Petition for Writ of Certiorari filed by the Petitioners ("Union") to review the judgment of the Illinois Appellate Court Second District. For the reasons set forth herein, this *second* Petition for review in this case should be denied because there are no compelling reasons for supervisory review.[1]

♦

COUNTERSTATEMENT OF THE CASE

Petitioners attempted to secure the organization of Lowe through Lowe's voluntary access to employees in the Fall of 1987. App. 4.[2] At trial, Business Agent Colin Darling testified that his only evidence that Lowe was not paying prevailing wages and benefits in 1988 "was just

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[1] *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (App. 2d Dist. 1989), *Ill. app. denied*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989), *cert. denied, 493 U.S. 975 (1989), further proceedings, Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 169 L.R.R.M. (BNA) 2301 (App. 2d Dist. 2002), *Ill. app. denied*, App. 58 (June 21, 2002).

[2] "R-x" references are to the Trial Court Record. "C-x" are to the Legal Record of the case. "App. x" are to the Appendix accompanying the Petition.

hearsay from a couple of his employees" he obtained in the summer of 1987. R-555.

In late 1987, the developer FAMCO secured a building permit for a nursing home at Canterbury Place in McHenry Country, Illinois, which was called Ballashire Hall. R-870. Ballashire Hall was a federally funded construction project of the federal Housing and Urban Development Agency ("HUD"). R-871.

Lowe had worked for FAMCO for approximately ten years when the Ballashire Hall project arose.

HUD contracts require employers on financed projects to pay employees the prevailing area wage in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5, implementing regulations at 29 C.F.R. §5 *et seq.*, and specific prevailing area wages and benefits established by the United States Secretary of Labor.

On Monday February 15, 1988, the Union began picketing Lowe at Ballashire Hall with signs stating: "LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA." C-741.

Soon after the signs were posted, Petitioner Darling was approached by Mr. Bradley Brei, President of FAMCO at the entrance to the project. Mr. Brei told Mr. Darling "that I had already filed certified payrolls with HUD that Lowe Excavating was paying prevailing wage rates and I could not understand on what the basis was that he was there or why the pickets were there." R-879 ll.10-15. Brei also asked Darling "how can you picket on a basis that he's not paying prevailing wage rates when they've been certified." R-907 ll.15-18. Mr. Darling did not respond to Mr. Brei's question. R-879. Instead, Mr.

Darling's response to Brei was for Brei to read the sign. R-567.

At trial, Mr. Darling did not deny that Brei had told him that Ballashire Hall was a prevailing wage jobsite and that Lowe was paying prevailing wage rate. In fact, the Union knew what Lowe's wages and benefits were before the publications began. R-001171 ll.15-17.

As a result of the conversation, Mr. Brei called Marshall Lowe and asked him what was happening, because the union was "saying you're not paying prevailing wages." R-888. Mr. Brei ordered Lowe to remove his people from the site. R-882-83.

Lowe was called back to the Ballashire Hall project in the summer of 1988 by FAMCO to finish grading. The Union reestablished pickets at Ballashire Hall in September 1988. R-591.

Darling knew that Lowe was working on the federal part of Canterbury place at that time. R-586. He used the same signs to claim that Lowe was not paying prevailing wages and benefits as in February 1988.

Brei's reaction to the renewed statements was "frustration, disgust with Local 150, frustration with Marshall that he didn't get his house in order or whatever had to be done in order to continue to work." R-895. Mr. Lowe again told Mr. Brei in September 1988 that his company was indeed paying the prevailing wage and "health and welfare that was beyond the prevailing wage." R-1210 ll.9-12. However, Brei was fed up, R-1210, 1234-35, and "visibly upset," R-1237. Brei was to "the breaking point," because he was signing the HUD certifications. R-1235-36.

Brei removed Lowe from Ballashire Hall again. R-895. Brei obtained a union contractor to take over Lowe's work. R-895, 921 ll.18-20.

On March 22, 1988, Lowe's employees elected the Congress of Industrial Unions ("CIU") as their bargaining representative. App. 25. On March 30, 1988, the Board certified the CIU as the collective bargaining agent for these employees. Local 150 chose not to participate in the election.

On August 15, 1988, Lowe entered into a collective-bargaining agreement with the CIU which required payment of wages and benefits greater than prevailing in McHenry County, and made retroactive to April 15, 1988. R-681; Pl. Ex. 61 p.5¶4. The Petition's assertion at 4 that the CIU delivers four page contracts to employers to sign misstates the record in the case and is not a fact in evidence in this case.

Lowe's expert witness Frank Stampler, CPA, of the CPA firm Frank W. Stampler & Company, audited Lowe's wages and benefits with two other CPAs for the period January 13, 1988, to February 16, 1988, at Ballashire Hall, and for two other periods in 1988. From January 1 to May 20, 1988, Mr. Stampler's audit shows that all Lowe's operators received over the prevailing rate for this period. R-1097 ll.16-22.[3]

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[3]The Union alleges that it's "audit" revealed that Lowe's wages were not the same as the Union's. But, that "audit" only compared Lowe's wages and benefits to the Union's contract. Furthermore, the allegations that the United States Department of Labor required a specific apprenticeship ratio was never alleged by the Union as the basis for its signs and was never proven as applicable to Ballashire Hall. The Department of Labor approved Lowe's apprenticeship plan retroactively, Pl. Ex. 54, and never disputed Lowe's certified

(continued...)

Lowe did not work with Brei or FAMCO again for another six years. R-1240.

On February 17, 1988, Lowe filed its complaint for temporary restraining order, preliminary and permanent injunctive relief and for damages in state court. Lowe attached a copy of its certified payroll for the Canterbury Place job to the complaint. App. D ¶ 16. The next day, the union removed the case to the federal district court in Chicago, Illinois, alleging, among other things, that Lowe's complaint was preempted by federal law. The district court disagreed, "because Lowe's complaint does not on its face contain a federal claim" and remanded the case back to state court. Local 150 *did not* appeal this ruling. App. 26.

On October 11, 1988, the trial court granted Lowe's motion for a temporary restraining order, prohibiting the Union from "picketing or otherwise disseminating the fact that Lowe is non-union." C-210. Simultaneously, the trial court denied "Respondent's request for preliminary injunctive relief from alleged picketing, with knowingly false placards relating to area standards, in reckless disregard for the truth is denied, based on federal preemption grounds." *Id.*

Lowe appealed and the Illinois Appellate Court reversed. App. 24. Petitioners filed a request with the Illinois Supreme Court for leave to appeal, but the request was denied on June 1, 1989. *International Union of Operating Engrs., Local 150 v. Lowe Excavating Co.*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989). This Court denied the Union's Petition for Writ of Certiorari on November 27, 1989. *International Union of Operating Engrs., Local*

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[3](...continued)
payrolls.

150 v. Lowe Excavating Co., 493 U.S. 975 (1989). Discovery ensued.

Trial commenced in April and June 2000. The Appellate Court's final decision issued on February 22, 2002. App. 1.

♦

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Appellate Court's Ruling on the Interpretation of Defamation *Per Quod* is in Accord with Longstanding Caselaw, Supreme Court Precedent, and National Labor Policy

The Petitioners renew their claim made in 1989 to this Court that the decision below conflicts with other decisions of this Court. Noticeably, the arguments listed today as Arguments I & II in the current Petition are the verbatim arguments made to this Court on pages 7-17 in the Union's first Petition to this Court in this case on September 1, 1989 (Case No. 89-377). Those arguments, and the first Question for Review presented to the Court today, should be denied review for the same reasons the Court denied review in 1989.

There are no surprises in the analysis made by the Appellate Court below. Careful review of the cases cited by the Union as creating a conflict were discussed at length by the court below. That court plainly considered and relied upon this Court's decisions in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); and *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977). The decision below does not create or sustain a conflict in the circuits or in any state court.

Not only did the Appellate Court recognize that the matter of area standards was an issue for the Labor Board, App. 35, but it also recognized that the Illinois courts have clearly established that its citizens have the right to be free from malicious defamation and the right is firmly rooted in Illinois policy. App. 35.

The affirmative language of this Court in *Linn*, 383 U.S. at 61, 63 (1966), establishes that, "Malicious libel enjoys no constitutional protection in any context....In such case, the one issuing such material forfeits the protection under the Act."

> Nor should the fact that defamation arises during a *labor dispute* give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice . . . [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. *The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function.*

Id. at 63 (emphasis added).

The Union's claim that the Labor Board's jurisdiction is at risk when the Union engages in area standards picketing misreads *Linn*. Moreover, the Union's "area standards" is not the defamatory matter at issue. The Union never raised the question before the Labor Board with a timely charge. Consequently, the assertion that the Labor Board's jurisdiction preempts a malicious libel case is speculative, especially when this Court stated in *Linn* that Board jurisdiction is not exclusive in these situations.

The Petitioners demonstrated no cases to the court below or in the Petition that the Board would find action-

able union defamation under §8(b)(4)(ii), 29 U.S.C. §158(b)(4)(ii). Nothing in the statute makes it an unfair labor practice for a union to engage in defamatory activities with actual knowledge or in reckless disregard of the truth or that those activities independently are coercive actions proscribed by the Act. The provisos to §8(b) presume that the truth will be published, but provide no remedy when it is not.[4]

Rather than rejecting the Union's claim that labor law questions must be carefully considered, each of the Petitioners' arguments concerning federal preemption under *Garmon* were reviewed by the court below. The argument was also in issue at the time of the Union's removal petition to the federal court. Petitioners' arguments of Board preemption could have been made to the Seventh Circuit in an appeal of the district court's ruling in 1988, but were not. App. 26. The Union waived this opportunity.

Moreover, the appellate court below specifically recognized the federal concern raised by the Union and agreed that "the activity in question is 'arguably protected' by the Act." App. 31. What was determinative to the Appellate Court, was this Court's ruling in *Linn* that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits

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[4]29 U.S.C. §158(b)(4)(i)(ii)(D), states in relevant part:
"Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public...."
29 U.S.C. §8(b)(7)(C), states in relevant part:
"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public...."

within the exception specifically carved out in *Garmon*." *Linn*, 383 U.S. at 62". App. 32-33.

In *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), the Court demonstrated that activity arguably within section 7 or 8 of the NLRA is preempted, but that "compelling state interests" were not overridden. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court applied the concept to uphold a state court injunction which precluded the union's tortious picketing activity. Although the Court thought the conduct "was arguably prohibited and arguably protected by federal law," it was permissible for the state court to restrain the location of the picketing. *Id.* at 198.

The Petitioners seek to make more of this case than can be attributed to it. It claims the existence for the first time that the Labor Board might look into labor costs in assessing a union's violation of the Board's "area standards" doctrine. Pet at 14. However, this argument was not raised to the Appellate Court or decided.

None of the Petitioners' cited cases at 13-17 involve issues of untruthful or reckless picketing. In fact, the issue in those Board cases was whether area standards picketing by itself implicitly contains an unlawful "object" and therefore should be illegal per se.

In *Local 107, Int'l Hod-Carriers (Texarkana Constr. Co.)*, 138 N.L.R.B. 102 (1962), two Board Members, Rogers and Leedom, dissented because the Board found area standards picketing not of itself to contain an unlawful object. Ten years later, in *Delivery Drivers Local 296 (Alpha Beta Markets, Inc.)*, 205 N.L.R.B. 462 (1973), the Board specifically stated that whether or not area standards picketing should be illegal *per se* under the Act is best left to Congress.

Consequently, the Board will only find area standards picketing to be a pretext for organizational or secondary purposes where there is an admission or a violation of the Board's *Moore Drydock Co.*, 92 N.L.R.B. 547 (1950), standards. The mere fact of defamatory picketing does not substitute for the Board's burden of proof to show an illegal object. And if Lowe's complaint here violated some union right, the union could have been expected to timely file its own unfair labor practice charge, which it did not.[3]

The Appellate Court correctly proceeded to hold that the Petitioner's argument that union publication of untruths involving area standards are no different from the publication of other untruths. Petitioners provided "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis." App. 33. The court below also made the correct determination that the matter at issue is not whether Lowe in fact "paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." App. 35. Hence, area standards were not ever before the state court for resolution.

The state court in defamation actions will also not be injecting itself into the "merits of a labor controversy," *Linn*, 383 U.S. at 64, because redress of "defamation actions preserved in *Linn*...can be adjudged without regard to the merits of the underlying labor controversy." *Farmer*, 430 U.S. at 299-300. The Illinois Appellate Court's precise formulation coincides with this analysis, that "[t]he issue is whether defendant, with actual malice,

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[3] "[I]t may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice." *Linn*, 383 U.S. at 66.

published a statement with knowledge of its falsity, or in reckless disregard for the truth." App. 35. And it did so by applying the high standard of defamation *per quod*. App. 15. This is the same limitation set out in *Linn* to "guard[] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned in the Act." 383 U.S. at 65.

There is nothing the state court could decide in this case that will upset the balance in the law since truthfulness does not directly concern the Board's supervisory mission. Even if the state court concludes the truthfulness question erroneously, *see Sears, supra*, since truth is only a collateral issue to finding an "object" required for intervention of the Board under §8, the balance will not be upset.

Moreover, the Appellate Court did not interpret any union contract as part of its analysis as the Union alleges at Pet. 17. As the Appellate Court found, the "facts were uncontroverted" that Lowe paid prevailing wages and benefits "as required by federal law to its employees." App. 16. The state court did not interpret and compare the Union's contract to Lowe for purposes of evaluating the Union's defamation.

The issues are plainly not ones to be entertained by the Board within its unfair labor practice jurisdiction. The only reason the issue is important to Petitioners is because they view the Act as permitting picketing with impunity in order to pressure non-signatory employers with the signal effect of causing work stoppages because the Board will never impose a remedy for the employer. Under the Union's theory, an employer will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. *Linn, supra*, at 63.

These cases cited above demonstrate the approach to preemption is not rigid under *Garmon*, but flexible. *Sears*, 436 U.S. at 188 n.13. Accordingly, there is no fundamental federal policy or caselaw conflict to be reconciled by granting the writ.

B. THE APPELLATE COURT APPLIED THE CORRECT RULE OF LAW ON ACTUAL MALICE TO THE FACTS

The Petition argues that the lower court failed to properly apply the standard of "actual malice" required in defamation cases. The decision reveals the contrary. Yet, in this factually intensive review that Petitioners wish this Court to undertake, the appellate court correctly decided that Lowe met the tripartite test in *Linn* by showing that the Union's publications were false, were made with knowledge of their falsity, and Lowe was actually harmed. 383 U.S. at 65.

The Petitioners fail to recognize that what they describe as the "negligence standard" asserted as error applied below, is derived from this Court's own libel caselaw. First, the inquiry whether the publisher of the alleged libel published in reckless disregard for the truth is not dependent on the publisher's belief:

> The finder of fact must determine whether the publication was indeed made in good faith. *Professions of good faith will be unlikely to prove persuasive*, for example, where a story is fabricated by the defendant, is the product of his imagination, or is *based wholly on an unverified* anonymous telephone call. Nor will they be likely to prevail when the publisher's *allegations are so inherently improbable* that only a reckless man would have put them in circulation.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (emphasis added).

In the present case, the appellate court found that Mr. Darling's reliance on an interview with two of Lowe's employees in the summer of 1987 at a different jobsite was improbable. Furthermore, recklessness was demonstrated by Mr. Darling's refusal to acknowledge FAMCO President Bradley Brei's statements to him that Lowe and FAMCO submitted certified payrolls to the federal government that Lowe paid prevailing wages since "it was a HUD job and prevailing wages were certified and I couldn't understand why the pickets were there and why they were stating that." R-884.

That the Union and Mr. Darling have a preferred interpretation of the Court's caselaw, is not a basis for granting the writ when it is based on the refusal to acknowledge that this information would make the publications defamatory. In this case, the "facts were uncontroverted." App. 16. Mr. Darling did not respond to Mr. Brei's question how he could make the claims stated on the sign, R-879, or state any support for his claims at that time. According to Darling, his only response to Brei was to tell Brei to read the sign, R-567, and did not respond to the question.

The Petitioners reason that the Appellate Court below "improperly stated that Local 150 'should have at least entertained serious doubts as to the truth of the statements contained on the picket signs,'" allegedly suggests what the defendants knew or should have known. Pet. 21. This argument was not fully briefed to the Appellate Court or reached. Yet, the argument fails to comprehend that the court found the Union's assertions were not uttered in good faith and that upon receipt of knowledge that Ballashire Hall was a federal project, the Petitioners did not pause to reconsider their improbable claims.

In the instant case, Darling actually knew on the morning of February 15, 1988, that the Union claim that "Lowe Excavating Does Not Pay the Prevailing Wages and Economic Benefits" was publicized on a federal Davis-Bacon Act project where prevailing wages and economic benefits were mandated by federal law (or be convicted of a felony under the Anti-Kickback Acts, 18 U.S.C. § 874 & 41 U.S.C. § 54).

The appellate court's determination is a fair interpretation of this Court's precedents. Lowe demonstrated by clear and convincing evidence that Darling and the Union were provided information that their publications were libelous, and both *continued* to absolutely refuse to acknowledge the defamatory nature of their publications.

Further, the Petitioners claim that the reckless disregard for the truth or "actual malice" standard does not equate with entertaining serious doubt about what is being published is erroneous Pet. at 21. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), this Court explained serious doubt is part of the standard: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Here, Darling was told specifically that his statement was incorrect and why it was incorrect. He refused to acknowledge the information and authorized continued publications. The Court below was well within its authority to find that the Union's refusal to consider new information provided to it along with the Union's secret rules regarding "audit" evidence (such that it would never consider an employer's own submission of evidence and the Union would never tell an employer that the Union would only consider a Union auditor's report, App. 6), established action in reckless disregard for the truth.

Instead, the Union continues to allege that it "received no hard evidence in response" to its picketing. Pet. at 23. The record shows it received evidence that facts it

continued to utter were reckless; Illinois law requires that it "should...recognize the likelihood that some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance." 28 Restatement (Second) of Torts § 623A comment b at 336 (loss of privilege).

The facts arising in this case are unique. The courts of Illinois have been exceedingly careful not to permit defamation awards unless this Court's high standards have been met. *Wanless v. Rothballer*, 115 Ill.2d 158, 503 N.E.2d 316 (1986); *Pease v. Operating Engrs., Local 150*, 576 N.E.2d 614 (App. 2d Dist. 1991). "'Reckless disregard' means 'proceeding to publish the defamatory matter despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." *Mittelman v. Witous*, 135 Ill. 2d 220, 237-38, 552 N.E.2d 973 (1989).

The cases cited in the Petition at 22, such as the age discrimination case of *Brown v. M&M/Mars*, 883 F.3d 505 (7th Cir. 1989) (ADEA case-no libel asserted), do not support the Petitioners' claim. *Martin v. State Journal-Register*, 244 Ill. App.3d 955, 612 N.E.2d 1357 (4th Dist. 1993), however, demonstrates that Illinois courts are well aware of the serious considerations needed to confirm a defamation award. Here, the finding of actual malice was based upon multiple considerations. App. 17.

This case turns on its own facts. Nothing the Petitioners have argued to denigrate the "uncontroverted" facts affirmed by the appellate court is persuasive.

The interests of state and federal policy were carefully considered by the appellate court and are completely in balance with these policies in this case. Further, the narrow grounds on which the decision was decided are not important enough to warrant this Court's review.

♦

CONCLUSION

For the reasons set out above, the Court should deny Petitioners' request for a writ of certiorari to the Appellate Court of Illinois, Second Judicial District.

Respectfully submitted,

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Dated: October 18, 2002